

# EXHIBIT J

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
  
AT CHARLESTON

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IN RE: ETHICON, INC. PELVIC REPAIR  
SYSTEM PRODUCTS LIABILITY LITIGATION

MDL NO.  
2:12-MD-02327

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THIS DOCUMENT RELATES TO:

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CAROLYN LEWIS

CIVIL ACTION NO.  
2:12-cv-04301

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February 12, 2014  
Charleston, WV

TRANSCRIPT OF TRIAL - DAY 3  
BEFORE THE HONORABLE **JOSEPH R. GOODWIN**,  
UNITED STATES DISTRICT JUDGE, AND A JURY

Court Reporters: Teresa M. Ruffner, RPR  
(304) 528-7583  
terry\_ruffner@wvsc.uscourts.gov  
  
Harold M. Hagopian, RDR-CRR  
209 Drake Landing  
New Bern, NC 28560  
hhagopian@aol.com

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**APPEARANCES**

**FOR THE PLAINTIFF:**

**THOMAS P. CARTMELL, ESQ.**

Wagstaff & Cartmell  
Suite 300  
4740 Grand Avenue  
Kansas City, MO 64112

**BENJAMIN H. ANDERSON, ESQ.**

Anderson Law Offices  
1360 W. 9th Street  
Suite 215  
Cleveland, OH 44113

**RICHARD A. FREESE, ESQ.**

Freese & Goss  
Regions Harbert Plaza, Suite 3120  
1901 6th Avenue North  
Birmingham, AL 35203

**CARL N. FRANKOVITCH, ESQ.**

Frankovitch Anetakis Colantonio & Simon  
337 Penco Road  
Weirton, WV 26062

**FOR THE DEFENDANTS:**

**CHRISTY D. JONES, ESQ.**

Butler Snow  
P. O. Box 6010  
Ridgeland, MS 39158-6010

**DAVID B. THOMAS, ESQ.**

**PHILIP J. COMBS, ESQ.**

**SUSAN ROBINSON, ESQ.**

Thomas Combs & Spann  
P. O. Box 3824  
Charleston, WV 23558-3824

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1 THE COURT: Who is going to address something about  
2 Dr. Jordi?

3 MR. THOMAS: Yes, Your Honor.

4 THE COURT: That's what we need to hear.

5 MR. THOMAS: Thank you, Your Honor. David Thomas  
6 for the defendants.

7 Dr. Jordi, as I understand it, is the next witness to be  
8 called by the plaintiffs. Dr. Jordi is an analytical chemist.  
9 Plaintiffs and defendants agreed to split a mesh explant from  
10 Mrs. Lewis for analysis. Dr. Jordi received half, the Ethicon  
11 expert received half, and they proceeded to do their analysis  
12 on the Lewis explant.

13 When we received Dr. Jordi's expert report, Dr. Jordi, in  
14 addition to analyzing the Lewis explant, had also analyzed 22  
15 other explants that had been provided to him by plaintiff's  
16 counsel. These are litigation explants. We did not know  
17 about those explants in advance of the Jordi report, and, as a  
18 result, Ethicon has not had the opportunity to do any kind of  
19 testing or analysis on the explants that Dr. Jordi includes in  
20 his report.

21 The same issue arose in connection with the testimony of  
22 Dr. Klinge.

23 THE COURT: I recall.

24 MR. THOMAS: And the Court excluded testimony about  
25 the explants, litigation explants because they're unreliable.

1 I ask that the Court do the same here and limit Dr. Jordi to  
2 his analysis of the Carolyn Lewis explant.

3 There are a number of reasons why the testimony of the  
4 other 22 would prejudice the defendants in this case, not the  
5 least of which it would introduce into this case the fact that  
6 there are 22 other cases against this defendant, and that  
7 would obviously prejudice us, the fact that his testimony  
8 about the other implants does not advance the ball, if you  
9 will, about the Carolyn Lewis case. The selection bias has  
10 already been recognized by the Court.

11 We don't have access to what they did. We didn't have  
12 the same explants that they did, so we didn't have the  
13 opportunity to test and to meet whatever opinions he might  
14 have. So we have no way to respond. So that's the prejudice  
15 to the defendants.

16 MR. ANDERSON: Yes, Your Honor. Ben Anderson. In  
17 Dr. Jordi's report, he stated that they had sent one of their  
18 representative to Steelgate, which houses thousands of  
19 explants. We put in there that when we received the samples,  
20 we saved half of them and sent half of the sample back to  
21 Steelgate. The defendant was aware of that.

22 Defendants say they have not had the opportunity to  
23 review it. They've had months and months to review it. All  
24 they had to do was ask. They saw in his report that half of  
25 the sample had been saved, just like it had for Mrs. Lewis.

1 THE COURT: There are thousands of explants at  
2 Steelgate?

3 MR. ANDERSON: Steelgate is --

4 THE COURT: Well, how did he select the samples,  
5 what methodology?

6 MR. ANDERSON: Yes, Your Honor. The methodology was  
7 he sent one of his Ph.D. lab techs from Jordi Labs and said go  
8 and get every TVT, TVT-O sample that you can as long as  
9 there's enough to be able to do testing on it. So warts and  
10 all, without any prior testing, without any prior knowledge,  
11 they went to Steelgate and selected all of the ones that had  
12 enough to do a battery of tests that are --

13 THE COURT: So Steelgate has thousands of explants  
14 but only a handful of TVT explants.

15 MR. ANDERSON: Well, more than a handful.

16 THE COURT: Twenty-some?

17 MR. ANDERSON: That method criteria of do we have  
18 enough to where we can, A, cut it in half to make sure the  
19 defendant has the same opportunity to do testing that we did.  
20 That was the first criteria. B, that after it is cut in half,  
21 that we still have enough to be able to do the different types  
22 of analyses, which six or eight different types of analyses --

23 THE COURT: How many TVT explants were there,  
24 without regard to his Ph.D. student's criteria or his  
25 criteria?

1 MR. ANDERSON: There were dozens and dozens of them.  
2 And a lot of them, some of them were not in formalin, so they  
3 were all dried out. That would provide no good information.  
4 Many of them were too small.

5 The slings, unlike the prolapse meshes, when they take  
6 them out, literally they are slivers about the size of your  
7 pinkie, and so you're talking microscopic. And so they had to  
8 try to determine from these samples are we even going to have  
9 enough to make sure that when we cut it in half -- and we  
10 photographed that entire process, Your Honor, to make sure --

11 THE COURT: You photographed every TVT explant that  
12 Steelgate had and chose a certain number from those  
13 photographs?

14 MR. ANDERSON: Yes, Your Honor, we did.

15 THE COURT: Have the defendants been provided all of  
16 the photographs of every explant that Steelgate has?

17 MR. ANDERSON: We have all of the photographs  
18 that -- of the explants that we looked at.

19 THE COURT: No, no, no. I mean I assume you looked  
20 at all of them, right? I may not be understanding you. I  
21 understood that you sent a Ph.D. associate to Steelgate,  
22 whatever that is, and they looked at every TVT explant. Is  
23 that right?

24 MR. ANDERSON: All of the TVTs and TVT-Os were  
25 brought out in the sample bottles to be able to determine



1 whether they were so tiny that it would make no sense to cut  
2 them in half and still give half to the defense. So they did  
3 look at all of those, and the only ones that were large enough  
4 were brought back. And I think it's significant that not all  
5 of them showed degradation. So we didn't just select the ones  
6 that looked best for us. We had some that hurt us. But we  
7 put them in there, and it's in his report.

8 THE COURT: What I'm trying to determine is how  
9 many -- I understand one of the criteria which I assumed Dr.  
10 Jordi would testify to was that he instructed his associate to  
11 only select samples which were large enough to cut in half.  
12 Is that right?

13 MR. ANDERSON: And to still be able, once they were  
14 cut in half, to be able to do the battery of tests.

15 THE COURT: All right. And he instructed him to  
16 photograph all samples, including those that weren't large  
17 enough.

18 MR. ANDERSON: No, we did not photograph the dozens  
19 of ones that weren't large enough.

20 THE COURT: Dozens? Hundreds? Tens? What?

21 MR. ANDERSON: I don't have the list in front of me,  
22 Your Honor. I apologize. I can try --

23 THE COURT: So what -- I don't get what -- all  
24 right. Let me hear from you.

25 MR. THOMAS: Your Honor, there are lots of moving

1 parts in this case. I'll be honest with you, if the  
2 plaintiffs told us that there were mesh explants, half of mesh  
3 explants available for us to review in advance of Dr. Jordi's  
4 report, David Thomas didn't know about it. Whether somebody  
5 on the trial team or somebody within the litigation --

6 THE COURT: How did you make the notification?

7 MR. ANDERSON: In his report.

8 MR. THOMAS: That's the point. I did know about it  
9 at the time that I got his report, and I took his deposition  
10 about a couple of days after his report. And at that point I  
11 see that there are 22 explants that we don't have notice of.

12 Even if, Your Honor, even if I was able to get access to  
13 the explants, you'd like to think that I'd be able to have my  
14 expert look at them before I have to take the deposition of  
15 Dr. Jordi. And then there's not enough time for my expert to  
16 do the same analysis and to offer any opinions that might be  
17 appropriate to respond to the opinions about the additional  
18 explants.

19 The only explanted issue here, Your Honor, is Carolyn  
20 Lewis. And I would suggest to the Court that there's nothing  
21 about these other 22 explants that makes Dr. Jordi's opinion  
22 more likely than not about degradation, which is the issue  
23 he's here for.

24 MR. ANDERSON: May I respond, Your Honor?

25 THE COURT: Yes. I'll let you go back and forth.

1 I'll be like Judge Dennis Knapp, who was on the bench when I  
2 started practicing law. If I had time, I'd let you go back  
3 and forth until you both got tired. But we'll just go a  
4 couple more times. Go ahead.

5 MR. ANDERSON: The report was -- the report was  
6 served, and his deposition, first deposition was taken at the  
7 end of October, four months ago. He found out in the report,  
8 which was a month before that, Ethicon did, that there were  
9 these samples. Not one e-mail, not one request for them to be  
10 able to go down there and look at them.

11 Then he took the deposition. He had an opportunity to  
12 depose him on each and every one of the slides, the SEM  
13 analysis, the high-magnification analysis, and any of the  
14 other analyses. And, in fact, he did that, not for one, but  
15 two days, because he came back and did another deposition two  
16 months later.

17 So he has had months for his experts to take a look at  
18 this. The idea here feels like, Your Honor, is let's just not  
19 ask for them, and then when Mr. Anderson wants to offer them  
20 in his case, we'll say we were sabotaged.

21 But they've had months and months to do this. Their  
22 expert is Exponent, the largest defense expert analysis  
23 company in the world, in Philadelphia. They can crank out  
24 product, Your Honor. Not once did they say to us, "Please let  
25 us have these and we will send our people." In fact, they

1 sent representatives from Exponent to Jordi's Labs before.  
2 They were there for Mrs. Lewis's sample when it was received.  
3 Not once did they reach out and say, "You know, we'd like to  
4 do the same thing on the other 22."

5 So to lie and wait until we come to the courtroom now and  
6 then to say, "Oh, over these last four months, we've not had  
7 an opportunity to do this" is not fair.

8 THE COURT: I'm more concerned about the methodology  
9 and -- the methodology used to select the implants that were  
10 examined.

11 MR. ANDERSON: Take them all, warts and all, as long  
12 as they're large enough to be able to cut it in half so that  
13 his people would have an opportunity and so that we would have  
14 an opportunity to do our testing. That was the idea, sir.

15 THE COURT: And that would be the testimony of your  
16 witness.

17 MR. ANDERSON: He's sitting in the courtroom. He  
18 can proffer it up right now, if you'd like.

19 THE COURT: I mean I take it that probably the  
20 student who actually did that is not here.

21 MR. ANDERSON: He's not.

22 THE COURT: But that was the direction that your  
23 expert gave, was to take every TV sample, TVT or TVT-O sample  
24 that was large enough to cut in half and -- one; two, wasn't  
25 dried out; three, anything else?

1 MR. ANDERSON: It was large enough to be able to  
2 perform six different types of tests on it, that we wanted to  
3 make sure if we had an opportunity to do all those tests, that  
4 they would have an opportunity to do the tests. And there's  
5 already a limited amount of sample. So we had to make sure  
6 that there was plenty to do SEM testing and some other types  
7 of testing that require you to use the product, and it gets  
8 destroyed. So that's why we saved half, and we had to make  
9 sure there was enough to do six different types of tests on  
10 the material.

11 THE COURT: So the samples were selected to meet the  
12 protocol that your doctor designed to do the testing.

13 MR. ANDERSON: Well, it's an industry standard. He  
14 was going to run industry standard testing for determining  
15 degradation of polypropylene.

16 THE COURT: All right. So we're right at the  
17 eleventh hour, so I'm trying to be probing on this. So the  
18 six tests that were used to select the samples, were these six  
19 tests that are the standard protocol for testing polypropylene  
20 for degradation? Is that correct?

21 MR. ANDERSON: They are, Your Honor. They're not  
22 the only ones, but they are the primary ones.

23 THE COURT: Well, then, how were they chosen from --  
24 how were other tests omitted and those six chosen?

25 MR. ANDERSON: If I could just clarify one thing

1 that I think we've gotten -- at least I've gotten maybe  
2 confused, Your Honor, and I apologize.

3 THE COURT: Okay. That's not hard to do.

4 MR. ANDERSON: There's different types of testing  
5 you can do in order to look at degradation of -- and here  
6 let's just talk about polypropylene fibers, to make it  
7 specific. One is you look at --

8 THE COURT: I hate to interrupt you. Let me  
9 interrupt you for just a second. Did he do the same tests  
10 that their expert did?

11 MR. ANDERSON: They did the same tests we did.

12 THE COURT: Exactly?

13 MR. ANDERSON: Yes, sir.

14 MR. THOMAS: I don't think that's true.

15 MR. ANDERSON: Oh, I don't know if his experts chose  
16 to do every one that we did.

17 THE COURT: Did they do more than you did?

18 MR. ANDERSON: No, they didn't do more than we did.

19 THE COURT: All right. First, back to my original  
20 question. There are six standard tests that you did, but  
21 there are more than six standard tests. Your expert chose six  
22 particular tests, correct?

23 MR. ANDERSON: In order to -- no, there are no other  
24 tests outside of the six that he did that I am aware of, Your  
25 Honor.

1 THE COURT: All right. And that would be his  
2 testimony.

3 DR. JORDI: There was one other test that we chose  
4 not to do. It wasn't appropriate for this particular work  
5 setting.

6 THE COURT: All right. So let me run through the  
7 criteria again. The criteria is large enough to cut in half,  
8 large enough to conduct six standard tests on, but not a  
9 seventh standard test, which was not appropriate.

10 MR. ANDERSON: Correct.

11 THE COURT: And met whatever other criteria with  
12 regard to condition? You said weren't dried out or something  
13 like that.

14 MR. ANDERSON: That would be -- that would be it,  
15 Your Honor, I think. The only thing I want to point out, just  
16 so that the Court is aware, is not all of those tests could be  
17 run on each one of the samples because --

18 THE COURT: So when they selected them for those six  
19 tests, they ended up selecting samples that those six tests  
20 couldn't be run on.

21 MR. ANDERSON: What happens, Your Honor, is you have  
22 these tiny fibers, and sometimes when you run it through these  
23 \$500,000 machines -- okay? -- and you're dealing with  
24 microscopic things, sometimes they become destroyed as you're  
25 trying to look at them, and then you have to use more particle

1 to try to get the test to come out right. And if you've used  
2 up too much particle, you may not get to the next six because  
3 you don't have any left.

4 THE COURT: So on some of these samples you ran six  
5 standardized tests. On some of these samples you ran fewer  
6 than that because of an insufficient amount of material to  
7 complete the test.

8 MR. ANDERSON: Because of the nature of destructive  
9 testing of polymers.

10 THE COURT: Give me an idea of how many you ran six  
11 tests on and how many you ran less tests on.

12 MR. ANDERSON: I have two binders this big, Your  
13 Honor, and so I would have to go through here and try to pull  
14 all those out. It's twenty-four samples and six tests.

15 THE COURT: Well, 24 -- I excluded in Dr. Klinge's  
16 thing, the report didn't provide any information about how he  
17 obtained the particular samples.

18 Here this morning you're providing me with an explanation  
19 of how he selected them, but I would like the answer to this,  
20 to me an important question. How are we to know that the  
21 large samples are representative of explants, that is to say,  
22 that there's a scientific and reliable basis for concluding  
23 that 23 out of dozens or more is a representative sample?

24 MR. ANDERSON: Your Honor, the best that we could do  
25 is try to collect explants that were available. We took every



1 one that we could. We looked at every one of them, and we had  
2 all of that analysis in these books and that he deposed him  
3 on. We left no test out that was done. And of those, some of  
4 them showed degradation, some did not. They're all explanted  
5 and the same battery of tests are done on polypropylene. So  
6 it is more of an objective test than a subjective test.

7 In order to determine whether or not -- what the  
8 denominator is, if that's what you're looking for, Your Honor,  
9 the only way to look at the denominator is -- I'm sure they'll  
10 point out on cross-exam of one of our witnesses, "Well, this  
11 has been in hundreds of thousands of women and it doesn't  
12 degrade in all of them." No, but we have a representative  
13 sampling --

14 THE COURT: How do we know it's representative?  
15 That's my question. The only criteria that you've given me is  
16 not an indicator of representation. That is to say, you  
17 selected only samples -- and I grant you, they're the only  
18 ones you could get -- that were big enough. I don't know that  
19 because the sample was big enough shows that it's  
20 representative of explants.

21 MR. ANDERSON: By way of example, Your Honor, an  
22 analogy. Dr. Klosterhalfen on behalf of Ethicon has a  
23 database of explants, okay? Some of those explants, you can  
24 determine whether or not there was fibrotic bridging. Some  
25 you can't, because they weren't big enough. Some you can

1 determine whether or not there was scar plating. Some you  
2 can't because they weren't big enough or not a good enough  
3 sample.

4 What you do is you collect what you can and you do an  
5 analysis of those. And within the number that you have, you  
6 can make some determination as to, okay, out of this  
7 representative sampling of explants --

8 THE COURT: The problem is the representative part.  
9 That's what I'm trying to figure out with regard to *Daubert*  
10 and *Kumho Tire*, is was there a scientific methodology used to  
11 show that this is a representative sample.

12 In other words, if the only people I could find that had  
13 malaria were people that were in a malaria ward at a hospital,  
14 they would not be necessarily representative of everybody in  
15 the world that had malaria. As I think I pointed out -- and  
16 I'll say it again -- my analogies are always terrible, but go  
17 ahead.

18 MR. ANDERSON: I would say that, you know, Your  
19 Honor, they're welcome to point this out on cross-examination,  
20 but the only way to get explants is when they come out of  
21 women. You can't go and affirmatively take them out and just  
22 say we're going to take these out of healthy women and we're  
23 going to take these out of unhealthy women and we're going to  
24 compare it so that we have a denominator of all of the healthy  
25 explants with the unhealthy explants.

1 THE COURT: Okay. What's your expert on  
2 polypropylene going to say with regard to examining explants,  
3 if at all?

4 MR. THOMAS: Your Honor, my expert only has looked  
5 at the Carolyn Lewis explant.

6 THE COURT: That's all I need to hear. Your expert  
7 is qualified to offer, as I understand it, without objection,  
8 opinions about polypropylene degradation; is that correct?

9 MR. THOMAS: Correct, Your Honor.

10 THE COURT: And he may also offer opinions related  
11 to the degradation, if any, of Miss Lewis's explant. He's not  
12 a doctor. Neither he nor your polypropylene expert, absent a  
13 medical degree or a qualification in that regard, may talk  
14 about the effects of polypropylene in the human body. Is that  
15 clear enough?

16 All right. Let's give you -- we're almost five minutes  
17 till the jury comes in. I'm sure you need time to straighten  
18 your desk out. Yes, sir?

19 MR. THOMAS: I don't think you addressed the  
20 ultimate question, Your Honor, whether Dr. Jordi will be  
21 permitted to talk about the additional explants.

22 THE COURT: No --

23 MR. THOMAS: Thank you.

24 THE COURT: -- he may not.

25 MR. ANDERSON: What if we voir -- what if I offer to

1 voir dire him for proffer in front of the jury on that  
2 particular issue?

3 THE COURT: No. We'll start at 9:00.

4 MR. THOMAS: Thank you, Your Honor.

5 THE COURT: Court is in recess.

6 MR. ANDERSON: Your Honor, I'm sorry. Can I address  
7 one more thing with you?

8 THE COURT: You may.

9 MR. ANDERSON: I'm so sorry. So, Your Honor, Dr.  
10 Jordi's expert report represents thousands of pages. He did a  
11 battery of tests on not only two dozen of these explants, he  
12 has dozens of people at his laboratory, Ph.D. chemists, a lot  
13 of different machines that went into this, okay?

14 We also looked at pristine samples. So that was more  
15 money. So if, if he -- we can't bring in the information  
16 about their analysis that took months to do at hundreds of  
17 thousands of dollars of cost, because these are not  
18 inexpensive, if he -- when I put him on the stand, he's only  
19 going to talk -- being allowed by Your Honor's ruling to talk  
20 about one sample, it would be patently unfair and unfairly  
21 prejudicial if Mr. Thomas were allowed to come in and say,  
22 "How much money have you spent in this case? Oh, \$500,000?"  
23 And it wouldn't be representative of what the jury can  
24 actually hear.

25 THE COURT: This will shock you. I agree.

1 MR. THOMAS: I don't intend to do that, Your Honor.

2 THE COURT: All right.

3 MR. ANDERSON: Thank you.

4 MR. CARTMELL: I apologize. One more thing. We are  
5 going to start with videos. We have three, and there are some  
6 objections by the defense that are left.

7 THE COURT: Okay. Well, let's go ahead and get this  
8 done.

9 Would you tell the jury we're going to be starting just a  
10 few minutes late? I'm sure they'll be shocked.

11 MS. JONES: Your Honor, we were told we were  
12 starting with Mr. Jordi.

13 MR. CARTMELL: Who told you that?

14 MS. JONES: Ben told me that earlier.

15 MR. CARTMELL: Yesterday I said we were playing  
16 videos first. I apologize.

17 MS. JONES: All I'm asking is for you to let us know  
18 who you intend to play and what we're going to talk about.

19 MR. CARTMELL: Isenberg, Angelini, and Hart.

20 THE COURT: Okay. And what are the issues?

21 MR. CARTMELL: Isenberg first.

22 MR. COMBS: Judge, they told us they were playing  
23 Muhl and Jordi. I've got to go back and get the stuff. I  
24 mean it's in the room right adjoining the courtroom.

25 MR. CARTMELL: I'd just like to make the record

1 clear. We had e-mails last night. We're required by our  
2 agreement to tell them the night before who we are  
3 considering. I'm not sure we're required to tell them the  
4 order that we're doing it. I don't know who told you that,  
5 but we have told them before who we're playing today. And  
6 we're ready to talk about Isenberg and Hart and Angelini.

7 MR. COMBS: Well, Judge, there's also an agreement  
8 that we would get a cut of the deposition that they intend to  
9 play. As far as I know, we don't have that. The Angelini cut  
10 we got at 7:52 a.m. The agreement was we would have it the  
11 night before. The agreement was they would give us the video,  
12 the clip to be played. If we have that, I don't know --

13 THE COURT: All right. We can't all talk at once.  
14 All right. Back here.

15 MR. CARTMELL: Well, here's the problem that's  
16 happening here, is we get these things done and signed off on.  
17 They've been done and signed off on a long time ago. There  
18 are remaining objections. We started to take the position  
19 because we were in their offices all day and all night for  
20 weeks that we couldn't come to an agreement on some, so we  
21 said, "Okay. We'll come here to court and before we put them  
22 on, if you want to make your objections, make your  
23 objections."

24 It sounds like they're saying that they haven't had these  
25 signed off complete deals that they're objecting to for over a

1 week. They have.

2 Now, the video issue is just simply Michael being able to  
3 put the material on a video and get it done. But they know  
4 the testimony we intend to play; they have for weeks. And the  
5 jam-up here I guess is what you're saying is the video doesn't  
6 come. You know what's going to be played.

7 MR. COMBS: Judge, I don't know what's going to be  
8 played. We stood here yesterday and went over the Hinoul cut.  
9 We walked up here. Exhibits were being proffered I'd never  
10 seen. It ended up not being the exhibits. We then went over  
11 the cut. We compared the cut to the cut I had, and they ended  
12 up not playing all that cut. So I end up standing up here and  
13 all of a sudden it just stops.

14 THE COURT: I'm going to give you 15 minutes to get  
15 these things, as best you can, ready. If you can't, if either  
16 side says to me that you can't get them ready, if either side  
17 says you can't get them ready, then you'll provide me with the  
18 court reporter's transcript of the deposition with the  
19 objections and everything in it and we'll start with somebody  
20 reading it on the stand; and when we get to an objection, I'll  
21 rule on it, okay?

22 MR. COMBS: And so it's Isenberg, Angelini, Hart?

23 MR. CARTMELL: Yes.

24 THE COURT: And, of course, that would apply to all  
25 future video depositions as well if we can't do these. I mean

1 I am surprised by what I'm seeing. I'm not dealing with  
2 inexperienced people. You've tried big cases before. You've  
3 met with opposing counsel before. You've worked out  
4 depositions before. The rules provide that I should be doing  
5 this by the transcript, and that's the way I can do it in the  
6 absence and in the exercise of my discretion allowing another  
7 methodology. I'm about to run out of patience for other  
8 methods.

9 Fifteen minutes, twenty minutes -- in twenty minutes,  
10 9:20, we'll start. Thank you.

11 (Recess)

12 (The jury entered the courtroom.)

13 THE COURT: Good morning, ladies and gentlemen. I'm  
14 sorry for the delay. You know, sometimes when your computer  
15 goes down, you have to unplug it and plug it back in. I kind  
16 of had to do that. So we're going to -- we've rebooted.

17 Call your next witness.

18 MR. CARTMELL: Dr. Richard Isenberg, Your Honor.

19 THE COURT: All right.

20 (Video of Dr. Richard Isenberg played.)

21 MR. CARTMELL: I apologize for interrupting.  
22 Plaintiffs have ended their examination of Dr. Isenberg.

23 THE COURT: All right. Ladies and gentlemen, what  
24 follows will be a portion that the defendants offer in  
25 response.



1 (Video of Dr. Isenberg resumed.)

2 MR. COMBS: Judge, that ends the defense questions.

3 THE COURT: All right. This is now redirect  
4 examination.

5 (Video of Dr. Isenberg resumed.)

6 MR. CARTMELL: Your Honor, that's the end of Dr.  
7 Isenberg's deposition.

8 THE COURT: All right. Call your next witness.

9 MR. COMBS: Judge, there's no need for a sidebar at  
10 all, but could I just briefly talk to the court reporter to  
11 just reflect the agreement regarding the exhibits that we had  
12 before that deposition was played?

13 THE COURT: Yes.

14 MR. COMBS: Thank you.

15 THE COURT: You previously provided the Court with a  
16 transcript. Is that the one you want filed or are you filing  
17 a separate one?

18 MR. CARTMELL: We can file the transcript.

19 THE COURT: I assume you want it in the record.

20 MR. CARTMELL: Yes, we did.

21 (Bench conference with Mr. Combs and Mr. Cartmell)

22 MR. COMBS: Ma'am, just to reflect that prior to the  
23 deposition being played, we had an agreement on the exhibits,  
24 and we did not object to Exhibit 957. For Exhibit 120, it's  
25 my understanding plaintiffs were only moving to admit the

1 parts that were shown on the screen. No objection to 1002,  
2 but that's a learned treatise. No objection on 905. On 803,  
3 there was an objection, just subject to the Court's ruling  
4 yesterday on this identical exhibit. And so any questioning  
5 or the admission of that exhibit would just also be subject to  
6 the same requirements as the Court ruled upon yesterday in  
7 regard to that exhibit.

8 MR. CARTMELL: That's agreed.

9 (End of bench conference)

10 THE COURT: All right. Okay. Mr. Cartmell, call  
11 your next witnesses.

12 MR. ANDERSON: Yes, Your Honor. Plaintiffs call --

13 THE COURT: The exhibits, if you want them in the  
14 record, should be presented to the clerk.

15 MR. ANDERSON: Plaintiffs call Dr. Howard Jordi.

16 THE COURT: Okay. I'm just reminding you they need  
17 to get to Robin.

18 THE CLERK: Dr. Jordi, if you'll raise your right  
19 hand.

20 HOWARD JORDI, PLAINTIFF'S WITNESS, SWORN

21 DIRECT EXAMINATION

22 THE COURT: You may proceed.

23 MR. ANDERSON: Thank you, Your Honor.

24 BY MR. ANDERSON:

25 Q. Good morning, Dr. Jordi.

1 A. Good morning.

2 Q. Please tell the jury your name.

3 A. Howard Jordi.

4 Q. Where do you live, sir?

5 A. Bellingham, Massachusetts.

6 Q. And what is your profession?

7 A. I'm a chemist, an analytical chemist, biochemist, polymer  
8 chemist. I practice in all --

9 Q. I'm sorry?

10 A. I practice all those areas.

11 Q. How long has that been your profession, sir?

12 A. Well, really all my professional life.

13 Q. How long is that?

14 A. About 35 years now.

15 MR. ANDERSON: Your Honor, if I may approach.

16 THE COURT: You may.

17 BY MR. ANDERSON:

18 Q. Doctor, I'm handing you what has been marked as  
19 Plaintiff's Exhibit 20C. Do you recognize that as a copy --  
20 well, what do you have in front of you?

21 A. My resume or CV.

22 Q. Sometimes known as a curriculum vitae?

23 A. Yes.

24 MR. ANDERSON: Your Honor, if we could just offer  
25 the CV.

1 THE COURT: Is there objection?

2 MR. THOMAS: No objection, Your Honor.

3 THE COURT: It may be received.

4 BY MR. ANDERSON:

5 Q. Doctor, just tell the jury a little bit, if you could,  
6 about your background, training, and experience after you got  
7 out of high school and up until today.

8 A. I obtained my bachelor's degree in chemistry from  
9 Northern Illinois University in 1967. I continued my Ph.D.  
10 work and got my Ph.D. in 1974. I was shipped off to the U. S.  
11 Army where I worked at Walter Reed Army Medical Center. We  
12 worked on biodegradable polymer implants, among other things,  
13 where we were replacing portions of soldiers' jaws that might  
14 be blown off by a bullet, trying to repair the damage.

15 Then I went to work for Water's Associates in Milford,  
16 Massachusetts where I ran analytical laboratories. And then I  
17 went to LC Laboratories briefly. Unfortunately, the company  
18 went out of business. And I started my own business, which  
19 I've been in since 1980 to this day.

20 Q. And has your work at Jordi Labs also involved these  
21 fields of polymer chemistry, polymer science, and  
22 biochemistry?

23 A. It does.

24 Q. Tell the jury, please, Dr. Jordi, in a general sense what  
25 are some of the types of things that Jordi Labs does. And if

1 you could -- Your Honor, may I approach again?

2 THE COURT: You may.

3 MR. ANDERSON: When he's turning, the microphone is  
4 a little -- scoot it this way. Thank you.

5 BY MR. ANDERSON:

6 Q. So back to the question, can you please tell the jury a  
7 little bit about what Jordi Labs does?

8 A. Well, we analyze polymers and plastics in all their  
9 various facets. So we do failure analysis, we do additives  
10 analysis, we reformulations, we do litigations where there  
11 might be patent infringements where one manufacturer might be  
12 copying another's -- or allegedly copying another's product.  
13 We do a lot of testing to determine degradation.

14 Q. Okay. Anything else?

15 A. That pretty well covers it. We do a myriad of tests.

16 Q. I heard you say product failure analysis. Could you just  
17 explain to the jury what product failure analysis means for  
18 you in your industry, in the polymer industry?

19 A. Well, it could be virtually anything that's made from a  
20 plastic. You could get a bumper in from a car that's  
21 cracking, a paint can with a bottom falling out, or I remember  
22 running -- analyzing artificial hips that were made out of  
23 polypropylene. So I was checking it for degradation after it  
24 had been implanted in the body for long periods of time. The  
25 tests we were running were looking for degradation.

1 Q. Okay. Let's go back a little bit. What is biochemistry?

2 A. Biochemistry is the sum total of all reactions in the  
3 body and the components that make up the body or any living  
4 tissue.

5 Q. You mentioned the word polymers. Just explain in a  
6 layperson's terms what we're talking about when we're talking  
7 about polymers.

8 A. Polymers would be like where you have monomer and the  
9 monomers join to make a polymer. An analogy would be a house,  
10 a brick house, and each brick would be a monomer unit, and  
11 then when you put all the bricks together, you wind up with a  
12 house, which is the polymer.

13 Q. And is polypropylene a polymer?

14 A. Yes, it is.

15 Q. And has your work over these last 30 to 40 years involved  
16 product failure analysis of polymers, including polypropylene?

17 A. It has.

18 Q. Are there standard tests in your industry for analyzing  
19 polymers like polypropylene to determine whether or not they  
20 have degraded?

21 A. Yes.

22 Q. And have you performed some of those standard tests that  
23 we'll talk about to the jury today?

24 A. Yes, definitely.

25 Q. What does polymer degradation mean, please, just in

1 laypersons' terms? We're not all Ph.D. polymer chemists. So  
2 in a layperson's terms, what is polymer degradation?

3 A. It's basically a change in chemical and physical  
4 properties compared to a pristine or unused product.

5 Q. And have you published in the peer-reviewed literature,  
6 sir?

7 A. Yes.

8 Q. Approximately how many publications?

9 A. Twenty.

10 Q. And have some of your published articles listed in your  
11 CV also involved research by you on biodegradable polymers?

12 A. Yes.

13 Q. And have some of the publications involved polymer  
14 degradation?

15 A. They have.

16 Q. And during your 40 years of work in this field, have you  
17 ever tested medical devices for polymer degradation?

18 A. Yes.

19 Q. And have you tested explanted medical devices for polymer  
20 degradation?

21 A. Yes, like the hip.

22 Q. Has some of the work that you've done over the last 40  
23 years in terms of analyzing polymers for degradation looked at  
24 animal studies where they have explanted polypropylene from  
25 animals in order to determine whether there was degradation?

1 A. Yes.

2 Q. Can you give me an example of some of the testing that --  
3 or give the jury some idea of some of the testing you've done  
4 over the last 30 to 40 years with regard to polymer  
5 degradation for products that would be in the human body,  
6 other than the artificial hip that you mentioned?

7 A. The techniques that were used you mean?

8 Q. No, the actual products. Have you looked at contact  
9 lenses?

10 A. Oh, contact lenses, yes; artificial knees, artificial  
11 hips.

12 Q. You mentioned some work with the Army in terms of  
13 soldiers, looking at the jaw --

14 A. Poly lactic and glycolic acid copolymers, that was the  
15 material that was used.

16 THE REPORTER: Say that again.

17 THE WITNESS: Poly lactic and glycolic acid  
18 copolymers.

19 THE COURT: I still didn't hear it. Try me one more  
20 time.

21 MR. ANDERSON: Go slower, if you could.

22 THE WITNESS: Poly lactic and glycolic acid  
23 copolymers.

24 THE COURT: That's going to be on a test.

25 BY MR. ANDERSON:



1 Q. Have you ever been employed by medical device  
2 manufacturers to analyze their medical devices?

3 A. All the time.

4 Q. Approximately what percentage of your work has been for  
5 medical device manufacturers?

6 A. The majority of it is now. It's about 90 percent.

7 Q. The 90 percent of your work that goes into looking at  
8 product failure analysis for medical device manufacturers,  
9 have they asked you to look at their devices in order to try  
10 to improve the safety of the devices?

11 A. Yes, and failure, and just general testing.

12 Q. Was any part of that work, at least in part, to help  
13 identify defects with polymers that would lead to improved  
14 patient safety?

15 A. Sure, yes.

16 Q. Doctor, at my request did you perform an analysis of the  
17 polypropylene Prolene TVT devices?

18 A. I did.

19 Q. Did I ask you to look at both pristine samples as well as  
20 explanted -- an explanted sample?

21 A. Yes.

22 Q. And as part of the work in being able to express opinions  
23 here to the jury today, did I also ask you to look at  
24 peer-reviewed publications?

25 A. You did.

1 Q. Even before your work in this case, as part of your  
2 normal job routine do you review scientific literature?

3 A. All the time. It's necessary to keep up with current  
4 work, and the fields are always changing, just like new cars  
5 every year, and new methods come out all the time.

6 Q. Please tell the jury approximately how many scientific  
7 articles you've reviewed just for purposes of being able to  
8 talk to them here today about polymer degradation in the  
9 Prolene and TVT.

10 A. Hundreds.

11 Q. And did I also ask you to look at internal Ethicon  
12 documents?

13 A. You did.

14 Q. And Ethicon depositions?

15 A. Yes.

16 Q. How many pages of Ethicon documents and depositions have  
17 you reviewed before you came in here to talk to the jury  
18 today?

19 A. Several thousand.

20 Q. Did I ask you to prepare a report in this case?

21 A. You did.

22 MR. ANDERSON: Your Honor, may I approach?

23 THE COURT: You may.

24 BY MR. ANDERSON:

25 Q. I'm showing you what has been marked as Plaintiff's

1 Exhibit 20. Does that represent the report that you prepared  
2 in this case, sir?

3 Sorry. I don't need you to look through the whole thing.

4 A. No, I'm just looking to make sure -- but yes.

5 Q. And did you prepare a supplemental report at my request  
6 as well?

7 A. I did.

8 Q. And did you also review a TVT Prolene device?

9 A. I did.

10 Q. And did I also ask you to look at an explant sample from  
11 Mrs. Lewis?

12 A. You did.

13 MR. ANDERSON: If I could have -- first of all, I'll  
14 ask you to pull up Exhibit -- may I approach, Your Honor?

15 THE COURT: You may.

16 BY MR. ANDERSON:

17 Q. Is this the sample bottle from Mrs. Lewis's explant that  
18 you received at your -- at Jordi Laboratory?

19 A. Yes.

20 MR. ANDERSON: Your Honor, may we offer this?

21 THE COURT: Without objection?

22 MR. THOMAS: Yes, Your Honor.

23 BY MR. ANDERSON:

24 Q. If we could show that. Is this the sample bottle from an  
25 explant from Carolyn Lewis's body that you received at Jordi

1 Labs?

2 A. Yes.

3 Q. Were representatives of the defendants there when you  
4 received this?

5 A. Yes, there were.

6 Q. And what did you do with the representatives of the  
7 defendants to the sample after you removed it from the bottle?

8 A. The sample was split in two equal parts, half for us and  
9 half for them.

10 Q. Their experts take their part and go, and you kept your  
11 part?

12 A. We can test our part, they can test their part. Same  
13 thing.

14 Q. Are there tests that are standard in your industry for  
15 looking at the degradation of polymers like the polypropylene  
16 Prolene in TVT?

17 A. Yes.

18 Q. I want to spend a little time talking with the jury today  
19 about a couple of those tests. Certainly I don't want to go  
20 through that entire notebook. We may be here longer than any  
21 of us would like. But I do want to talk about a couple of  
22 those tests with you today, if I could, sir, please.

23 Have you heard of the term SEM analysis?

24 A. I have.

25 Q. What is an SEM analysis with regard to using it for

1 determining whether or not a polypropylene has degraded?

2 A. SEM stands for scanning electron microscopy, and it's  
3 just a fancy name for a high-powered microscope that lets us  
4 blow up the individual mesh particles, fibers, so we can see  
5 the cracks, if any, on the surface.

6 Q. And did you perform any analysis of cracks that came from  
7 the surface as part of analyzing the degradation of the  
8 Prolene that was explanted from that Mrs. Lewis's body?

9 A. We did.

10 Q. What is that test called?

11 A. Big words again. Fourier Transform Infrared Spectroscopy  
12 microscopy. We call it FTIR microscopy for short.

13 Q. And in shorter terms and hopefully laypersons' terms, can  
14 you tell us what FTIR microscopy seeks to do in your field?

15 A. It seeks to give us a picture of the structure of the  
16 molecule that we're looking at, the chemical composition of  
17 the structure of the -- in this case, mesh.

18 Q. Are SEM and FTIR microscopy two tests that are standard  
19 in your industry for analyzing polypropylene explanted  
20 material?

21 A. Yes.

22 Q. Now, you said that you reviewed hundreds of publications.  
23 I'd like to go through three of those with you today, okay?

24 A. Okay.

25 MR. ANDERSON: All right. May I approach, Your

1 Honor?

2 THE COURT: You may.

3 BY MR. ANDERSON:

4 Q. I'm showing you what we have previously marked as  
5 Plaintiff's Exhibit 820. Doctor, did you review that as part  
6 of your work in this case?

7 A. I did.

8 Q. And did you rely on that, at least in part, for  
9 formulating your opinions in this case?

10 A. I did.

11 Q. And does this come from a publication that is recognized  
12 and reliable in the scientific community?

13 A. It's a peer-reviewed journal, yes. Yes.

14 Q. Is it recognized and reliable?

15 A. It is.

16 MR. ANDERSON: May we offer it?

17 THE COURT: You may follow the Rule 803(18).

18 MR. THOMAS: No objection, Your Honor, as an  
19 803(18).

20 MR. ANDERSON: A learned treatise.

21 THE COURT: Right.

22 MR. ANDERSON: Yes, sir.

23 THE COURT: I apologize to the jury for that  
24 shorthand. The lawyers knew what I was talking about. The  
25 rules say that when talking with an expert and you have a

1 learned treatise, and that includes these peer-reviewed  
2 articles that they've been talking about, the witness may be  
3 asked about them and may read parts of it aloud, or the  
4 lawyers may as a part of their questioning read parts of it  
5 aloud. Go ahead.

6 MR. ANDERSON: Thank you, Your Honor.

7 BY MR. ANDERSON:

8 Q. And, Doctor, tell us who the authors are and when this  
9 article was written.

10 A. This is an article by Celine Mary et al., or others, and  
11 it was published in 1998.

12 Q. And I see that it says, "Comparison of the *in vivo*  
13 behavior of polyvinylidene fluoride and polypropylene sutures  
14 used in vascular surgery." Do you see that?

15 A. I do.

16 Q. And is polyvinylidene fluoride also known as PVDF?

17 A. It is.

18 Q. Okay. And if you could just call out the bottom there,  
19 the bottom right under Materials and Methods.

20 What does the Materials and Methods section of scientific  
21 papers seek to tell the reader?

22 A. It seeks to tell them what the materials were that were  
23 tested and what methods were used to test them.

24 Q. We talked about the PVDF that was going to be studied in  
25 this particular piece of literature, and it also said

1 polypropylene monofilament in the title.

2 What's polypropylene monofilament? If you'll highlight  
3 that second sentence. It says the control suture was a  
4 polypropylene monofilament manufactured by Ethicon (Johnson  
5 and Johnson), and then it lists some place in Canada, under  
6 the tradename Prolene. Do you see that?

7 A. I see it.

8 Q. Based upon all of your review of the thousands of pages  
9 of literature and internal Ethicon documents, as well as the  
10 depositions, did you come to an understanding as to whether or  
11 not Prolene polypropylene manufactured by Ethicon is, in fact,  
12 the polypropylene that is contained within the TVT device?

13 A. I do.

14 Q. And is it?

15 A. It's Prolene. So that's the Ethicon product --

16 Q. Okay.

17 A. -- tradename.

18 Q. All right. If we could turn over, please, and just go to  
19 pages 6 and 7. I'm sorry. Fourth page, top right corner.

20 We go down to "After one to two years." Do you see that  
21 where I am with you?

22 A. I do.

23 Q. "After one and two years of implantation, the surface of  
24 the retrieved and cleaned PVDF sutures did not appear to be  
25 substantially modified. In contrast, the polypropylene



1 sutures explanted one and two years postoperatively showed  
2 evidence of surface deterioration, characterized by uniformly  
3 spaced circumferential cracking and peeling and flaking of the  
4 polymer material in the outermost surface layer."

5 Do you see that, sir?

6 A. I see it, yes.

7 Q. What is that telling us about these two polymers?

8 A. It's telling us that PVDF is much more resistant to  
9 degradation than polypropylene, and that polypropylene is more  
10 susceptible to degradation.

11 Q. And, in particular, is this the polypropylene that's  
12 contained in the TVT?

13 A. That's correct.

14 Q. If we could go to page 6 of Plaintiff's Exhibit 820 and  
15 call out the image on the top page, also from the Celine Mary  
16 article, Doctor. I want to show you these images. We talked  
17 a little bit ago about SEM images. Is that what we're seeing  
18 here on the screen?

19 A. That's right.

20 Q. Can you tell us what these particular SEM images show of  
21 the polymers that were analyzed in this study?

22 A. Well, the left-side pictures are PVDF, the right-side  
23 pictures are polypropylene, and it's very obvious that the  
24 PVDF is much more stable, undamaged, than the right-side  
25 material. Polypropylene is severely cracked and degraded.

1 Q. So in the -- when we were looking earlier at the language  
2 in the study where it says that the Prolene showed evidence of  
3 surface deterioration, characterized by spaced cracking,  
4 peeling and flaking of the material, is that what's shown here  
5 in the SEM?

6 A. Right. In the right photographs, some of the flakes had  
7 actually come off. That's why you can see different layers.

8 Q. If we could go to page 7, 205 of the article. Let's call  
9 out that conclusion on the bottom right, beginning with visual  
10 evidence. Let's call that out. Thank you, Michael.

11 Highlight visual evidence.

12 "Visual evidence of surface degradation was observed  
13 after one and two years of the polypropylene but not the PVDF  
14 sutures. The stress cracking phenomenon is believed to be  
15 associated with the distinct skin/core two phase structure of  
16 oriented polypropylene monofilaments and points to the  
17 likelihood of PVDF having superior biostability to  
18 polypropylene over the long term."

19 When was this article written, sir?

20 A. 1998.

21 Q. 1998. From your review of the literature, do you have an  
22 idea of when -- and the materials you viewed in this case, as  
23 to when TVT was launched in the United States?

24 A. 1998.

25 Q. And when it talks there about this distinct skin/core two

1 phase structure that's cracking on the surface of the TVT  
2 Prolene, explain for the jury, please, what that means.

3 A. To make a filament, you use a die and then you force  
4 molten polypropylene or any plastic you're making a filament  
5 out of through the die. And when it comes out, it's hot, it's  
6 molten. The external skin of the fiber cools rapidly, and the  
7 interior portion of the fiber cools slowly. What this creates  
8 is an outer core that doesn't have time to form a crystalline  
9 structure -- and we call it amorphous -- an internal  
10 crystalline portion of the fiber, which is more resistant to  
11 degradation, although not completely.

12 Q. Based upon your training and your background and your  
13 experience and your review of all of the documents in this  
14 case, as well as your work looking at explanted medical  
15 devices, do you have an opinion to a reasonable degree of  
16 scientific certainty that you can state to the jury as to  
17 whether or not this phenomenon of surface cracking and  
18 degradation of polypropylene is something that is progressive?

19 A. It is.

20 Q. And what do we mean by "progressive"?

21 A. It means it's ongoing, so it will take some time to start  
22 and then it will start and then it will just continue  
23 indefinitely as long as it's implanted in a human tissue.

24 Q. So as long as the polypropylene is implanted in the human  
25 tissue, it will continue to degrade?

1 A. That's right, sir.

2 MR. ANDERSON: May I approach, Your Honor?

3 THE COURT: You may.

4 BY MR. ANDERSON:

5 Q. I'm showing you now what has been pre-marked as  
6 Plaintiff's Exhibit 1292. Before we put this up, let me ask  
7 you this, Dr. Jordi. In part of your review of the scientific  
8 literature in this case that I asked you to do and to be able  
9 to speak to the jury about today, did you notice whether or  
10 not there was any scientific literature on the degradation  
11 specifically of pelvic floor explants?

12 A. Yes.

13 Q. And is one of those articles in front of you there?

14 A. Yes.

15 Q. Did you review that article?

16 A. I did.

17 Q. Did you rely upon it, at least in part, in order to  
18 formulate your opinions in this case?

19 A. I did.

20 Q. Is it a recognized and reliable scientific journal?

21 A. Yes, it is.

22 MR. ANDERSON: Your Honor, we would offer it.

23 MR. THOMAS: No objection. 803(18), Your Honor.

24 THE COURT: All right. You may proceed.

25 MR. ANDERSON: Thank you.

1 BY MR. ANDERSON:

2 Q. And if we could just call out from the top there.

3 Perfect. When was this article written, Dr. Jordi?

4 A. 2010.

5 Q. Do you see there it's in the *International*

6 *Urogynecological Journal*? Do you see that?

7 A. I do.

8 Q. And the title is "Polypropylene as a reinforcement in  
9 pelvic surgery is not inert." What does that refer to when a  
10 polypropylene is not inert, based upon words in your industry?

11 A. It means it's going to react and degrade.

12 Q. Then it says "Comparative analysis of 100 explants," and  
13 the lead author there being Clave. Let's turn, if we could,  
14 to page 1 in the conclusion section of the abstract.

15 Thank you. If you could just look there -- are you there  
16 with me, Doctor?

17 A. I am.

18 Q. Let's highlight -- this is the first study to evaluate  
19 synthetic implants used in a vaginal approach for pelvic floor  
20 reinforcement. The study provides evidence contrary to  
21 published literature that's characterizing polypropylene as  
22 inert in such applications. Additionally, the study suggests  
23 the need for clinical trials comparatively investigating the  
24 performance of new types of monofilament prosthetics.

25 Prolene would be a monofilament prosthetic, correct?

1 A. It would.

2 Q. And, of course, PP stands for polypropylene there?

3 A. Yes.

4 Q. Okay. Now, if we could just turn over to the SEM images,  
5 page 5 of the article. Let's do all of them to begin with and  
6 then we'll zoom in. Thank you.

7 What are we seeing here in this image from the Clave  
8 study in 2011, Dr. Jordi?

9 A. We're seeing the degradation of polypropylene  
10 monofilaments.

11 Q. If we could just call out the LDMMF and the HDPPMF, what  
12 do all of those letters stand for, Dr. Jordi?

13 A. Well, the LDPPMF -- it's got a misprint in it. It should  
14 be PP for polypropylene.

15 Q. Is that density?

16 A. It stands for density.

17 Q. Is that another way of saying light weight?

18 A. Light weight. And the HDPPMF is the high density or the  
19 heavy weight.

20 Q. And is the Prolene in TVT a heavy weight polypropylene  
21 monofilament?

22 A. Yes.

23 Q. Now, from this article, we can't tell whether or not that  
24 is actually a Prolene polypropylene, correct?

25 A. Right.

1 Q. But we do know that the control sample on the left from  
2 this article is, in fact, Prolene, correct?

3 A. Yes.

4 Q. Okay. Let me ask you this, Doctor. Do these images here  
5 that you see represent -- what do they represent to you in  
6 terms of the polymer surface?

7 A. Again, bring back to the two structure surface that we  
8 talked about. The skin is cracked and the interior is  
9 still -- at this point in time, severe cracking of that outer  
10 layer of skin.

11 Q. And are these images that are contained in this  
12 scientific journal 13 years after the Celine article  
13 consistent with the degraded images we saw of Prolene in 1998  
14 in her article?

15 A. Yes, they're consistent. Yeah.

16 Q. If we could turn now to Exhibit 1925. I want to go over  
17 three articles with you before we talk about some of the other  
18 things in this case.

19 May I approach, Your Honor?

20 THE COURT: You may.

21 MR. ANDERSON: Thank you.

22 BY MR. ANDERSON:

23 Q. Is this an article that you reviewed as part of your work  
24 in this case?

25 A. It is.

1 Q. Did you rely on it at least in part in order to formulate  
2 some of your opinions in this case?

3 A. I did.

4 Q. And slow down just a little bit. It makes it easier on  
5 Terry, okay? But you're doing fine. Is this from a  
6 recognized and reliable scientific journal?

7 A. Yes.

8 MR. ANDERSON: Okay. I would offer it, Your Honor.

9 THE COURT: Without objection?

10 MR. THOMAS: (Nods head up and down)

11 THE COURT: All right.

12 BY MR. ANDERSON:

13 Q. Highlight the top of this. This is an article in -- is  
14 that 2013, just last year?

15 A. 2013, yes, sir.

16 Q. And this is the Wood article?

17 A. Wood article.

18 Q. Dr. Wood. And material characterization and histological  
19 analysis of explanted polypropylene and other types of hernia  
20 meshes from individual patients. Do you see that?

21 A. I do.

22 Q. And if we could just go to page 5. Call out images A and  
23 D, please, on the left. A and D. I apologize.

24 What are we seeing here in the Wood article just from  
25 last year?



1 A. The pristine material at the top, and then the explanted  
2 material at the bottom is cracked.

3 Q. And is that a polypropylene on the top?

4 A. They're both polypropylene.

5 Q. The same -- so one is the control or the pristine  
6 product?

7 A. One is the pristine, control.

8 Q. What does the image on the bottom tell us, Doctor?

9 A. It tells us that after implantation, it has degraded and  
10 cracked.

11 Q. From your review of these last three articles that we  
12 looked at, as well as your background and training and  
13 experience in looking at degraded polypropylene that's been  
14 explanted from the body, do you have an opinion to a  
15 reasonable degree of medical probability as to whether or not  
16 the Prolene polypropylene in TVT will degrade in women's  
17 tissues?

18 A. Yes.

19 Q. And what is that opinion?

20 A. It will degrade.

21 Q. In addition to reviewing the scientific literature,  
22 you've told the jury that you looked at some internal Ethicon  
23 documents, correct?

24 A. Correct.

25 Q. Did you review any internal Ethicon studies where they

1 looked at the degradation of the Prolene suture that would be  
2 used in the TVT device?

3 A. Yes.

4 MR. ANDERSON: Okay. Exhibit 1291. May I approach,  
5 Your Honor?

6 THE COURT: You may.

7 BY MR. ANDERSON:

8 Q. I'm showing you what has been previously marked as  
9 Plaintiff's Exhibit 1291. Did you review and rely upon this,  
10 sir?

11 A. Yes.

12 Q. Can you tell the jury what that is?

13 A. It's results from what was called a 10-year dog study.  
14 It didn't go that long. This is seven-year dog study results  
15 and other results at various time frames, five years, seven  
16 years, showing you what's happened to the meshes that were  
17 implanted -- or the sutures that were implanted. Sorry.

18 Q. And who's performing this internal testing? Is this done  
19 by Ethicon?

20 A. This is done by Ethicon.

21 Q. Okay. If we could go to page 116. And, Doctor, what  
22 year was the seven-year dog study results?

23 A. I think it was --

24 Q. Did they start in '85?

25 A. It started in the '80s. So after seven years, you'd be

1 around '92.

2 Q. And would that be six years before the TVT was launched?

3 A. Yes.

4 Q. Okay. If we could go to bullet point two. In looking at  
5 this internal --

6 MR. THOMAS: Excuse me. Counsel, I'm sorry. Stop.

7 THE COURT: It will be just a second.

8 MR. ANDERSON: I would offer this into evidence,  
9 Your Honor.

10 MR. THOMAS: No objection. I would note that the  
11 numbers aren't sequential. So if you're going to direct his  
12 attention to a specific document and if you could give us some  
13 idea where it is.

14 MR. ANDERSON: Be happy to. It's only a couple of  
15 pages in that document, but we will direct your attention to  
16 them.

17 MR. THOMAS: Thank you.

18 THE COURT: Is this document a learned treatise or  
19 is this an exhibit?

20 MR. ANDERSON: It's an internal Ethicon dog study on  
21 the Prolene suture, and so we would've put it in as an  
22 exhibit.

23 MR. THOMAS: Just for the record, Your Honor, it's a  
24 collection of documents, as opposed to an individual document.  
25 And the collection of documents have been identified by the

1 plaintiffs as a seven-year dog study.

2 THE COURT: All right. And does it bear a number  
3 for identification purposes?

4 MR. ANDERSON: Yes, Your Honor, it does.

5 THE CLERK: 1291.

6 THE COURT: All right. You may proceed.

7 BY MR. ANDERSON:

8 Q. If we could go to page 116 and call out -- he'll just  
9 flag it for you. And after that, we're going to go to 129.  
10 If my math is right, that's about 13 pages later.

11 MR. THOMAS: Thank you.

12 BY MR. ANDERSON:

13 Q. And if we could just highlight from conclusions all the  
14 way down through the second bullet point, Michael. Let's  
15 highlight the top portion of the document so the jury can see  
16 the date of the study.

17 Looking at the conclusions from the seven-year dog study  
18 in which the Prolene was implanted, under conclusions, bullet  
19 point two, the two Ethilon sutures -- sorry.

20 "Approximately 50 percent of the Prolene suture surface  
21 was cracked due to degradation. In some areas, a lower degree  
22 of surface change was found, which had not been observed  
23 before. These marks could very well be the early beginnings  
24 of the usual cracks."

25 Do you see that?

1 A. I do.

2 Q. Okay. Then if we could go to page 115.

3 MR. THOMAS: 115?

4 MR. ANDERSON: 115. Sorry. It's a rather large  
5 document. Do you have it, Mr. Thomas?

6 MR. THOMAS: No, I don't. Can you tell me where it  
7 is?

8 MR. ANDERSON: It's right in front of you. I'll try  
9 not to refer to the Bates number to not confuse the record.

10 MR. THOMAS: I have it. Thank you.

11 BY MR. ANDERSON:

12 Q. Let's call out the date and title there. Is this further  
13 documentation of this large Prolene dog study?

14 A. Yes.

15 Q. Okay. And if we could go to the second bullet point.  
16 For the study, you indicated they looked at this at various  
17 time points, this 10-year dog study. So this would be when  
18 they were looking at certain sutures taken out at the  
19 seven-year time point?

20 A. That's correct.

21 Q. Okay. And is it your understanding from looking at the  
22 document that they looked at it from time points even prior to  
23 that?

24 A. Yes.

25 Q. Okay. So let's see what they said here. "Degradation in

1 Prolene is still increasing at seven years here, and PVDF,  
2 even though a few cracks were found, is still by far the most  
3 surface resistant in-house made suture in terms of cracking."

4 Do you see that?

5 A. I do.

6 Q. What are we talking about here in terms of the dog study  
7 at seven years?

8 A. By seven years' time frame, we're talking about even PVDF  
9 shows a few cracks; the polypropylene continues to degrade  
10 more.

11 Q. Let's go to page 129. Upon your review of this, did you  
12 notice that they also did these SEM images of the explanted  
13 Prolene suture?

14 A. I did.

15 Q. Is that what you have in front of you there, sir?

16 A. Yes.

17 Q. If you could call out the one on the top right there,  
18 please. Okay. What do we notice in here in terms of the  
19 polypropylene fiber that was explanted from these animals at  
20 year seven by Ethicon?

21 A. We're looking at the typical cracks in the outer skin of  
22 the two-component fiber.

23 Q. Is that consistent with the Clave article from the pelvic  
24 floor explants, the SEM images in that article?

25 A. It is.

1 Q. Is it consistent with the explanted polypropylene images  
2 from the Wood article?

3 A. Yes.

4 Q. Is it consistent with the explanted images from Mary --  
5 Celine Mary from 1998 of the Prolene suture that was explanted  
6 there?

7 A. Yes, it is.

8 Q. Doctor, we showed the jury a few minutes ago the explant  
9 sample bottle where Jordi Labs had received the -- some of the  
10 explanted mesh and tissue from Mrs. Lewis. Do you recall  
11 that?

12 A. I do.

13 Q. Okay. Did I -- upon receiving that and dividing it in  
14 half and giving the defense consultants their half, what did  
15 you or at your direction have done with regard to Mrs. Lewis's  
16 explant sample as well as this Prolene control sample that you  
17 talked about earlier?

18 A. We had a whole battery of tests run to look for  
19 degradation.

20 Q. What did I ask you to do with regard to looking at the  
21 Prolene suture and -- the Prolene pristine sample versus the  
22 explanted sample from Mrs. Lewis's body?

23 A. We were tasked to do our battery of analyses and look for  
24 any differences between the pristine or new material versus  
25 the explanted material from Miss Lewis.

1 Q. In terms of a battery of tests, you talked earlier about  
2 there's a number of things that you can do in the polymer  
3 science industry in terms of looking at degradation of  
4 polymers and things like that.

5 Does any one particular laboratory have all the equipment  
6 necessary to do that type of analysis?

7 A. Generally, no.

8 Q. For instance, are some of these machines -- what are the  
9 prices we're talking about for some of these machines it takes  
10 to do this type of analysis?

11 A. Anywhere from 120,000 to half a million, sometimes a  
12 little more.

13 Q. SEM machines, scanning electron microscopes, what are we  
14 talking about in terms of pricing on that?

15 A. In the upper end there of that range. It depends on  
16 which model you get and what attachments.

17 Q. So given that some of your laboratories around the  
18 country don't have all of the equipment necessary, is it  
19 standard practice to share that type of work or to do analysis  
20 for one another?

21 A. We form what we call partner labs, and we have some  
22 capabilities they don't have, they have some capabilities we  
23 don't have, and we service each other.

24 Q. And has SEM analysis been something that Jordi Labs has  
25 performed for medical device manufacturers over the last 30



1 years in order to look at product failure analysis?

2 A. Yes.

3 Q. And who does -- do you do that in-house or do you have a  
4 partner lab that does that?

5 A. We have a partner lab.

6 Q. And did you send Mrs. Lewis's explant sample to your  
7 partner lab to have it undergo SEM analysis?

8 A. We did.

9 Q. We talked a little bit about that FTIR microscopy.

10 A. Yes.

11 Q. You said it's like taking a chemical photograph.

12 A. Right.

13 Q. Did you have that evaluated by FT -- her sample evaluated  
14 by FTIR microscopy?

15 A. We did.

16 Q. Did you include photos of those within your report?

17 A. Yes.

18 Q. Did you also perform any SEM analysis of the pristine  
19 sample?

20 A. We did.

21 Q. What's the purpose of doing that?

22 A. Again, we're looking for differences to see if -- and  
23 there were no cracks in the pristine. There were many cracks  
24 in the explant.

25 Q. What was the purpose of performing the SEM and the FTIR

1 microscopy test on Mrs. Lewis's sample that came from her  
2 body?

3 A. The purpose was to determine -- the first thing we saw  
4 from SEM was the cracks, the large-scale cracks. So the next  
5 question is, well, what is that cracked material. So we were  
6 able to remove some of that cracked material and run FTIR  
7 microscopy on the cracked material itself, and it was largely  
8 polypropylene, telling us that the cracked material coming off  
9 is polypropylene.

10 Q. So from your report, let's pull up one of the photographs  
11 of an SEM from one of pristine TVT Prolenes, okay? That's  
12 Exhibit 20, page 115.

13 He's flagged it for you there, Dave -- Mr. Thomas.

14 MR. THOMAS: Thank you.

15 THE CLERK: Is 20 admitted? This is Exhibit 20.

16 MR. ANDERSON: And just highlight the bottom one, if  
17 you could, and blow that up for us, Michael. Thank you.

18 BY MR. ANDERSON:

19 Q. So what are we looking at? Tell the jury what we're  
20 looking at here, Dr. Jordi.

21 A. We're looking at pristine fibers, pristine mesh material.  
22 And what's distinctive to me about this is that we have these  
23 die marks I call them or extrusion marks.

24 Q. Just put an arrow down perpendicular to that fiber,  
25 please, Michael. Are these the extrusion marks you're talking

1 about, Doctor?

2 A. Yes. They look like striations, and they're caused from  
3 minor imperfections in the die as it's being extruded. So we  
4 have these little rising and the lowering levels of the  
5 polypropylene in the individual fiber, but what you can see  
6 here is they look like little channels almost.

7 Q. And you said from the dies. Let's just make sure we're  
8 speaking to the jury and explain to them what that means when  
9 the polypropylene is going through dies, this extrusion. What  
10 are you talking about?

11 A. Well, again, the material is melted and it's forced under  
12 pressure through the die; and as it does, minor imperfections  
13 in the surface of the die are imprinted into this extruding  
14 material.

15 Q. And the die, you're talking about a form where they're  
16 pushing the polypropylene through it in order to treat the  
17 fiber?

18 A. It's simply a holder to allow the polypropylene to go  
19 through the form, the fiber.

20 Q. So on this pristine sample under SEM, do you see any  
21 surface degradation?

22 A. I do not.

23 Q. Okay. Now, if we could just pull up this slide from page  
24 48 of the same exhibit. Now, is the sample on the right from  
25 Mrs. Lewis's explant?

1 A. It is.

2 Q. And what are we seeing there in the picture on the right?

3 A. We're seeing the usual cracks from the explanted  
4 material. On the right, which is the pristine, we don't have  
5 any cracks.

6 Q. Go back to the one on the right. What are we seeing over  
7 there to the right of that picture, that white blob? What is  
8 that?

9 A. That's tissue remnants from the explant.

10 Q. Okay. Mrs. Lewis's tissue?

11 A. Mrs. Lewis's tissue.

12 Q. And the one on the right, you said the usual cracks. Do  
13 you mean is that degradation?

14 A. That's degradation.

15 Q. Do you have an opinion, Doctor, to a reasonable degree of  
16 scientific certainty as to whether or not the TVT  
17 polypropylene degraded in Mrs. Lewis's body?

18 A. I do.

19 Q. Do you have an opinion to a reasonable degree of  
20 scientific certainty as to whether or not, if there's still  
21 mesh left in her body, whether it is continuing to degrade to  
22 this day?

23 A. I do.

24 Q. What is that opinion?

25 A. It will continue to degrade as long as it's in her body.

1 Q. You mentioned that these experts from the defendant were  
2 at your labs when you received the explant. Do you remember  
3 that?

4 A. Yes.

5 Q. Did they do a report in this case?

6 A. Yes.

7 Q. Did you review their report in this case?

8 A. I did. I did.

9 Q. Did you review SEM photos that their experts did?

10 A. I did.

11 Q. Okay. Can you please put up demonstrative 12-2? I'm  
12 sorry. J-1.

13 Just for demonstrative purposes, we're going to look  
14 at -- we'd like to put it up.

15 MR. THOMAS: For demonstrative purposes?

16 MR. ANDERSON: Sure.

17 MR. THOMAS: Yes.

18 MR. ANDERSON: Put the two images side by side, if  
19 you would, Michael, so we can try to make this go a little bit  
20 faster, that image and the next image, please.

21 MR. THOMAS: Pardon me. May I ask a question? How  
22 will you identify it for the record?

23 MR. ANDERSON: Ong's report, it's identified for  
24 purposes of plaintiff's exhibit list as J-1 --

25 MR. THOMAS: All I want --

1 MR. ANDERSON: -- and J-2.

2 MR. THOMAS: Just for your information, I want to be  
3 able to ask the witness questions about the same documents.  
4 You haven't given me copies of them. I want to be able to  
5 call them out so they can be put back on the screen so I can  
6 ask questions.

7 MR. ANDERSON: We're happy to call them out.

8 MR. THOMAS: Just identify them so that I can.

9 MR. ANDERSON: I just did.

10 MR. THOMAS: Thank you.

11 BY MR. ANDERSON:

12 Q. What are we seeing here in these two images?

13 A. We're seeing on the left the cracked material; and on the  
14 right, we're seeing cracked material, actually broken off. In  
15 both cases, they've broken off, but this is after a 20-step  
16 cleaning process, which we didn't utilize. But these are  
17 still the same cracked materials.

18 Q. And these are the images that were taken by defendants'  
19 experts?

20 A. They are.

21 Q. Are they consistent with the images that you took as  
22 well?

23 A. They are.

24 Q. Okay. I want to go to Exhibit 20, please, page 71.

25 Exhibit 20. Doctor, we have seen -- we have seen in these SEM

1 photos -- pull it down for a second. We've seen in these  
2 photos those flaking particles.

3 A. We have.

4 Q. If somebody were to say to you, "Well, Doctor, how do you  
5 know those flaking particles are polypropylene," what would  
6 you say to them?

7 A. We do know it, and we tested it chemically by the FTIR  
8 microscopy to prove it.

9 Q. Okay. And would you like for us to put up the picture of  
10 the FTIR microscopy of particles from Mrs. Lewis's sample for  
11 the jury?

12 A. Yes.

13 Q. Is this from your report?

14 A. It is.

15 Q. Okay. Let's put that up, please. Highlight the top  
16 part, please, and tell the jury what we're looking at here.

17 A. That's just an optical micrograph. It's 150-power  
18 magnification of an individual particle that had flaked off of  
19 Mrs. Lewis's sample.

20 Q. You said it flaked off. How did you go about analyzing  
21 that?

22 A. The individual fibers that we saw that were cracked were  
23 rolled on an infrared transparent substrate. It's just a  
24 little sheet, but it lets infrared light through it. And then  
25 an individual particle which shows, and then that infrared

1 spectrum -- we've got a picture, in fact, of the chemical  
2 structure of this particle.

3 Q. How do we know that that particle that came off the  
4 surface of Mrs. Lewis's explant is polypropylene?

5 A. From the picture, which is below it.

6 Q. Okay. Let's show the picture below, please. Okay.  
7 Without getting -- without getting too polymer-sciencey, what  
8 are all these squiggly lines here?

9 A. The squiggly lines are absorption bands for each kind of  
10 chemical bond in the molecule. And what we have here is a  
11 composite of a little protein with a lot of polypropylene. So  
12 this particle is largely polypropylene. All the polypropylene  
13 bands are there. The little -- many of the little bands on  
14 the right -- I'm not going to go through the numbers right  
15 now, but there's four of them specifically are very small.  
16 And if you had even 50 percent polypropylene, it would be even  
17 hard to see those bands, but they're big and powerful, just  
18 like in a pristine pure polypropylene, telling me that this is  
19 largely pure polypropylene.

20 Q. Do you have an opinion to a reasonable degree of  
21 scientific certainty based upon everything you've viewed in  
22 this case and your 30 to 40 years of experience as to whether  
23 or not the flaking material on the surface of Mrs. Lewis's  
24 explanted TVT Prolene mesh is, in fact, polypropylene?

25 A. I do.



1 Q. What is that opinion?

2 A. It is polypropylene.

3 Q. Did you notice whether or not and from the defendants'  
4 expert reports whether or not they analyzed the flaking  
5 particles off of the polypropylene from Mrs. Lewis?

6 A. I saw no evidence of that in their report. No, they did  
7 not.

8 Q. What did their experts do to the explanted fiber from  
9 Mrs. Lewis before they analyzed the degradation?

10 A. They went through a complicated 20-step process, cleaning  
11 process, and then they didn't look at the particles like we  
12 did.

13 Q. Have you ever in your 30 to 40 years of practice ever  
14 seen anyone who -- any company in looking at explanted  
15 polypropylene use the same kind of 20-step process to clean  
16 the fibers?

17 A. Never in my life have I seen anything like that. If I  
18 looked at all the literature that we looked at earlier, this  
19 morning as well, they typically use one or two steps. And  
20 this is 20. It seems to be hugely excessive to me.

21 Q. What types of chemicals did they apply repeatedly to the  
22 surface of Miss Lewis's explant before they analyzed it?

23 A. They used sodium hypochlorite I think four times. They  
24 used nitric acid, concentrated nitric acid three times, which  
25 is a strong oxidizing agent. They used sonication, which

1 would violently shake the resin so that -- it's a high-  
2 frequent shaker is what it is, electrical shaker. It shakes  
3 the particles off. But then the problem was, they didn't even  
4 analyze the particles that came off.

5 Q. So after the defendants' experts applied chemicals and  
6 then shook the mesh violently in a 20-step process to make the  
7 particles fall off, they didn't even analyze the particles to  
8 see if they were polypropylene?

9 MR. THOMAS: Asked and answered, Your Honor.

10 THE COURT: Sustained.

11 BY MR. ANDERSON:

12 Q. Did you apply such harsh chemicals and shake, during your  
13 analysis, shake the particles off of Mrs. Lewis's sample?

14 A. No, we did not.

15 Q. Did they do FTIR microscopy of the particles that flaked  
16 off or that they shook off of Mrs. Lewis's sample?

17 A. No.

18 Q. A couple more questions. Do you have an opinion to a  
19 reasonable degree of scientific certainty based upon your 40  
20 years of experience and the work that you have done as you  
21 have explained to the jury today and your review of all the  
22 materials as to whether or not prior to this explant coming  
23 out of Mrs. Lewis, whether the materials were degrading in her  
24 tissues? Do you have an opinion?

25 A. Yes.

1 Q. What is that opinion?

2 A. They were degrading.

3 Q. And do you have an opinion to a reasonable degree of  
4 scientific certainty based upon all of the things you've  
5 reviewed and your training and experience as to whether or not  
6 the remaining mesh that's in her body will continue to degrade  
7 for the rest of her life?

8 A. Most definitely, yes.

9 MR. ANDERSON: Nothing further at this time, Your  
10 Honor.

11 THE COURT: Cross-examine.

12 MR. THOMAS: Thank you, Your Honor. I need a  
13 second.

14 THE COURT: Certainly.

15 MR. THOMAS: I'm kind of old fashioned here. I've  
16 got a white board.

17 THE COURT: Can we keep going until noon, or do you  
18 need a break?

19 A JUROR: Keep going.

20 THE COURT: If anybody needs a break, raise their  
21 hand.

22 We'll keep going until noon. Thank you.

23 I've got white board and Smart boards and all kinds of  
24 things I'd share with you.

25 MR. THOMAS: Oh, I'm sorry. I didn't know.

1 THE COURT: I'm kidding. Go ahead.

2 MR. THOMAS: The only thing I knew for sure is I  
3 couldn't do it electronically.

4 THE COURT: I've got you.

5 CROSS EXAMINATION

6 BY MR. THOMAS:

7 Q. Good morning, Dr. Jordi.

8 A. Good morning.

9 Q. Just a second. I think it works. Does that work okay?

10 Dr. Jordi, you would agree with me that degradation is  
11 the loss of functionalness of a polymer for its intended  
12 purpose, wouldn't you?

13 A. It's the loss of chemical and physical properties is the  
14 way we would define it.

15 Q. If you gave an answer in your deposition it was a loss of  
16 functionalness of a polymer for its intended purpose, would  
17 that be correct, or do you want to change your answer?

18 A. It's similar.

19 Q. Okay. I want to put that up here because we'll be  
20 referring to it, I think, for a while today. So degradation  
21 is the loss of functionalness of a polymer. And the polymer  
22 here is polypropylene, correct?

23 A. Correct.

24 Q. Now, let's talk a little bit about how you prepared your  
25 samples in this case. Now, you received the samples as you've

1 described on direct examination. You and the Ethicon experts  
2 got together and you split the samples.

3 A. Right.

4 Q. You went your way and the Ethicon folks went their way.

5 A. Right.

6 Q. No agreed protocol about how to test these things. You  
7 kind of -- you did what you did and the Ethicon folks did what  
8 they did.

9 A. Yes.

10 Q. You've learned that the Ethicon folks -- and I'll refer  
11 to them later -- Shelby Thames from Southern Mississippi?

12 A. Correct.

13 Q. And Kevin Ong from Philadelphia?

14 A. Yes.

15 Q. And you, I think, and Mr. Kulcarni are the people  
16 primarily who did the work for the plaintiffs in this case; is  
17 that correct?

18 A. Well, many other people in our organization did pieces of  
19 the work --

20 Q. Okay.

21 A. -- as well.

22 Q. And the first thing you did when you received these  
23 samples -- and we saw the little container -- and the sample  
24 was packed in formalin, correct?

25 A. Correct.

1 Q. And formalin is a preservative?

2 A. Yes, it is.

3 Q. And it's routinely used with tissue to preserve that  
4 sample so pathology can be conducted on it later.

5 A. That's correct.

6 Q. And in these tissue samples, there's also protein,  
7 correct?

8 A. Absolutely, yes.

9 Q. And you knew at the time that you received these samples  
10 that there were protein on that mesh.

11 A. I did. You could see it.

12 Q. And you knew also that it was packed in formalin.

13 A. Yes.

14 Q. And you knew later that there was a chemical reaction  
15 between the formalin and the protein that formed a  
16 cross-linked polymer on that mesh, right?

17 A. That's right.

18 Q. You didn't know that at the time -- I'm sorry?

19 THE COURT: I didn't say anything.

20 MR. THOMAS: I apologize.

21 BY MR. THOMAS:

22 Q. And it was only after you conducted your testing that you  
23 realized that there was a cross-linked polymer of formalin and  
24 proteins on that mesh, correct?

25 A. Well, we knew there was a reaction. That's what fixation

1 means, there's going to be a reaction of formalin with the  
2 protein that's there, sure.

3 Q. Okay. And it's that reaction that fixes the mesh in  
4 place that allows a pathologist to slice the mesh and analyze  
5 it, correct?

6 A. It's primarily used in the industry for slicing tissue.

7 Q. Right. But that's what it does. It reacts with the  
8 protein, hardens it, so it can be sliced, correct?

9 A. The tissue, yes.

10 Q. Okay. And so when you began to clean this, you cleaned  
11 it with forceps, correct?

12 A. Correct.

13 Q. And forceps can be like scissors or tweezers or something  
14 like that?

15 A. Yes, tweezers; yes.

16 Q. And basically you took the mesh in your hands or  
17 Mr. Kulcarni took the mesh in his hands and took the forceps  
18 or the scissors and pulled the mesh away -- pulled the tissue  
19 away from the mesh, correct?

20 A. That's right.

21 Q. So you had forceps in one hand, mesh in the middle,  
22 forceps in the other, and you're just picking the mesh away.

23 A. That's right.

24 Q. And it took about an hour?

25 A. Per sample, yes.

1 Q. And that's all the cleaning that you did.

2 A. That's all the cleaning we did.

3 Q. Okay. You didn't attempt to remove the protein and  
4 formaldehyde cross-linked polymer that was on that mesh, did  
5 you?

6 A. I would beg to differ because when you pull the fixed  
7 tissue away from the fiber, you are removing this cross-linked  
8 polymer.

9 Q. Okay. So it's your testimony that by using the forceps,  
10 you were able to remove all of the protein and formaldehyde  
11 cross-linked polymer?

12 A. No, we obviously -- the infrared showed some protein. So  
13 there was still some protein, residual protein on the fiber.

14 Q. Okay. And what Dr. Thames did is Dr. Thames utilized  
15 what you described as this 20-step cleaning process, correct?

16 A. Correct.

17 Q. And you know that Dr. Thames, before he did his work,  
18 understood that there was this formaldehyde-protein cross-  
19 linked polymer, and it was his goal by this 20-step screening  
20 process to remove that. You know that, don't you?

21 A. Yes.

22 Q. And, again -- and so the forceps you used was all that  
23 you used to try to get at the protein-formaldehyde bond,  
24 correct?

25 A. Correct.



1 Q. Okay. And you know that even with this 20-step cleaning  
2 process utilized by Dr. Thames, he was unable to remove all of  
3 the protein from the mesh. You know that, don't you?

4 A. I would beg to differ with that, but so he said.

5 Q. Okay. Okay. You disagree with that.

6 A. I disagree with that.

7 Q. All right. Now, after you took the forceps and pulled  
8 the tissue away from the mesh, you handled it, correct? You  
9 put the mesh in your hands and felt it.

10 A. Yes.

11 Q. And as a matter of fact, you rolled it in your hands.

12 A. We didn't roll it in our hands, sir. We rolled it on the  
13 infrared transparent substrate.

14 Q. And it's when you rolled it on the infrared substrate  
15 that these particles came off, correct?

16 A. Correct.

17 Q. And when you handled it in your hands, it cracked and  
18 broke?

19 A. When we rolled it on the substrate, some of the particles  
20 came off.

21 Q. It cracked and broke. I believe you testified about that  
22 in your deposition.

23 A. It was already cracked, but it broke, yes, and the  
24 particles literally -- fragments came off.

25 Q. When you rolled it on there, it broke apart and these

1 particles appeared.

2 A. Correct.

3 Q. And as a matter of fact, it's these particles that came  
4 off the mesh when you rolled it is what you've tested in this  
5 case by FTIR microscopy.

6 A. That's correct.

7 MR. THOMAS: I'm not sure it's such a good idea,  
8 Judge.

9 BY MR. THOMAS:

10 Q. Now, you know Dr. Thames did not roll the mesh. Do you  
11 understand that?

12 A. I do.

13 Q. Did not handle the mesh like you did. Do you know that?

14 A. Well, that's if, if you say, you know, the 20-step  
15 cleaning process wasn't handling, again, I beg to differ, sir.

16 Q. Okay. You've described very specifically what you did  
17 with the mesh. You put it in your hands. You tried to feel  
18 whether it was stiff, correct?

19 A. Yeah.

20 Q. Whether it was brittle, correct?

21 A. That's correct.

22 Q. With your hands, right?

23 A. You have to do that, yeah.

24 Q. And then you rolled it on the FTIR microscopy plate where  
25 these particles came from, correct?

1 A. Correct.

2 Q. You don't know of any similar things that Dr. Thames did  
3 like what you've just described, do you?

4 A. I do not.

5 Q. Okay. Now, after you found these particles, you sent  
6 them out for testing, correct?

7 A. No, we sent out a piece of tissue with a mesh embedded in  
8 it to Evans Analytical who ran the FTIR microscopy for us, and  
9 they actually did the rolling on the infrared substrate  
10 that's --

11 Q. Okay.

12 A. It's part of their methodology, SOP.

13 Q. So Evans is an organization in California?

14 A. Yeah, the lab is, yes.

15 Q. And there's one in Minnesota as well?

16 A. That's the SEM lab.

17 Q. So you sent portions to the Evans SEM lab in Minnesota so  
18 that they could do the scanning electron microscopy, correct?

19 A. That's right.

20 Q. And you sent tissue also to California so that Evans  
21 could do the FTIR microscopy, correct?

22 A. Almost. Because the -- we were so sample-limited, we  
23 sent it out for SEM first, and then the Evans SEM folks sent  
24 it to the Evans FTIR microscope people in California when they  
25 were done with the SEM work.

1 Q. And you relied on Evans to do all of that work, correct?

2 A. Yes. In this case, yes.

3 Q. And you had no supervision, direction, or control over  
4 the work that Evans did on the SEM or the FTIR, correct?

5 A. Once the samples were sent, that was their  
6 responsibility.

7 Q. So FTIR and SEM, both done by Evans. And, again, the SEM  
8 is of the mesh, correct?

9 A. That is correct.

10 Q. But the FTIR is only a particle, correct?

11 A. That's correct.

12 Q. So you don't have an FTIR test of the mesh that's  
13 depicted in your SEM pictures, do you?

14 A. No, because we were looking at -- looking for the damaged  
15 material only.

16 Q. Well, was it your first choice to have Evans test the  
17 mesh by FTIR?

18 A. Well, I think that was true --

19 Q. And the reason why --

20 MR. ANDERSON: Excuse me, Your Honor. Can he finish  
21 his questions -- his answer?

22 THE COURT: Yes. Did you have additional --

23 THE WITNESS: Yes, sir.

24 THE COURT: Go ahead.

25 THE WITNESS: Thank you. The original mesh that

1 was -- we had tried to run an infrared of it, it was too  
2 thick. The transmission wouldn't let any infrared light  
3 through. So basically you couldn't run the total sample like  
4 that. You had to look at the particles or you had to do a  
5 process called thinning to get it thin enough to where you  
6 could get infrared light through it.

7 BY MR. THOMAS:

8 Q. It's true that Evans couldn't do that test, correct?

9 A. They could do it, sure.

10 Q. I mean Evans could not analyze the mesh by FTIR  
11 microscopy without some modification to the mesh as you've  
12 just described, correct?

13 A. Not in transmission mode, right.

14 Q. Okay. But other labs have the capability of doing that,  
15 don't they?

16 A. So did Evans.

17 Q. But they didn't do it.

18 A. No, because we saw the particles and we felt that that  
19 was the better way to go.

20 Q. I thought your first choice was to do the mesh first.

21 A. Well, it didn't run in transmission mode, so we ran the  
22 particles.

23 Q. Because you couldn't make it work.

24 A. That's not at all unusual --

25 Q. Okay.

1 A. -- in analyses.

2 Q. Well, just to be clear, Dr. Thames had all the equipment  
3 available to him in his laboratory, didn't he?

4 A. You mean Dr. Thames' lab? I don't believe so.

5 Q. Well, he is a professor at the University of Southern  
6 Mississippi?

7 A. Right.

8 Q. Past president of the University of Southern Mississippi?

9 A. Right.

10 Q. Polymer chemist for 50 years?

11 A. Yes.

12 Q. His name is on the building at Southern Mississippi,  
13 isn't it?

14 A. Sure.

15 Q. And the lab at Southern Mississippi has FTIR microscopy,  
16 doesn't it?

17 A. And just like us, they don't have SEM. So they had the  
18 SEM done by Dr. Ong at Exponent, not there.

19 Q. You're suggesting that Dr. Thames didn't do any SEM  
20 analysis at his lab?

21 A. The SEM work, the sample prep work was done by Dr. Ong,  
22 and I believe -- I thought the SEM work was done by him as  
23 well.

24 Q. Okay. Do you know that for sure? Do you know whether  
25 Dr. Thames and his group did any SEM work at the University of

1 Southern Mississippi in the lab there?

2 A. I didn't see that in his report.

3 Q. Okay. Put a question mark there.

4 Okay. And just so we're clear, Dr. Thames and his group  
5 did FTIR testing of the actual mesh, correct?

6 A. Yes.

7 Q. And so unlike you, Dr. Thames has both an FTIR and an SEM  
8 image of the same mesh that he tested, correct?

9 A. We have SEM and FTIR of the particles of the same mesh  
10 that we tested, yes.

11 Q. Okay. Now, you've complained a lot today about this 20-  
12 step cleaning process that Dr. Thames and Dr. Ong conducted,  
13 correct?

14 MR. ANDERSON: Objection, Your Honor.

15 MR. THOMAS: Criticized. Strike that. Sorry.

16 BY MR. THOMAS:

17 Q. You've criticized Dr. Thames and Dr. Ong for the way they  
18 conducted this 20-step cleaning process, correct?

19 A. It seemed grossly excessive to me, yes.

20 Q. And your complaint is that the nitric acid may have  
21 oxidized some of the polypropylene, changed it.

22 A. That, and the sodium hypochlorite and the sonication.

23 Q. Let's take them one at a time. It's true that in your  
24 analysis you were not able to find any evidence that the  
25 nitric acid used in that 20-step cleaning process changed the

1 polypropylene mesh at all, did you?

2 A. I'm sorry. I didn't understand the question. Was I able  
3 to do that testing?

4 Q. Did you -- do you have any opinion at all that the work  
5 done by Dr. Thames and Dr. Ong in cleaning the mesh altered  
6 the chemical structure of the mesh?

7 A. I believe it very well might have.

8 Q. But you don't have an opinion in that regard, do you?

9 A. I do.

10 Q. Really? Excuse me just a minute, Your Honor.

11 THE COURT: Uh-huh.

12 MR. THOMAS: I've got to move on and come back to  
13 that.

14 THE COURT: All right.

15 BY MR. THOMAS:

16 Q. Now, your complaint about this 20-step cleaning process  
17 is that the cleaning process actually removed any cracked  
18 polypropylene that may have been present on the mesh; is that  
19 correct?

20 A. It removed some of it.

21 Q. And if it removed some of the cracked polypropylene, you  
22 would expect the size of the polypropylene mesh to change,  
23 wouldn't you?

24 A. Yes.

25 Q. And, in fact, after this 20-step cleaning process, Dr.



1 Thames and Dr. Ong measured the mesh after it had been  
2 cleaned, compared to a pristine sample, correct?

3 A. Yes.

4 Q. And Dr. Thames and Dr. Ong found that there was no change  
5 in the size of the mesh after cleaning compared to the  
6 pristine sample, correct?

7 A. That's a relative statement, yes.

8 Q. It's true?

9 A. May I explain?

10 Q. First you can say yes or no, and then you can explain if  
11 you need to.

12 A. They said it was the same.

13 Q. Okay.

14 A. Now, they measured the diameter of a particle, of the  
15 fiber, and they said it was 170 microns. And they also showed  
16 that this thin skin we talked about earlier was 3.15 microns.  
17 So a total loss of surface width would be 6 microns, roughly,  
18 on both sides out of 170 microns. But their standard  
19 deviation is 7 microns. So it was well within experimental  
20 error. So I say it's the same.

21 Q. Okay. So you're saying that it's so small that their  
22 measurement technique was not able to capture any difference.  
23 Is that fair?

24 A. I'm saying it's within their margin of error.

25 Q. Okay. You didn't do your own testing, did you?

1 A. No, we were looking at the particles.

2 Q. Okay. It's a good control, isn't it, to test your  
3 cleaned mesh against your pristine mesh to see if the size of  
4 the mesh had changed?

5 A. Repeat the question, please.

6 Q. It's a good control, isn't it, to test your clean mesh  
7 against your pristine mesh to see the extent to which it's  
8 changed?

9 A. Yes, it is.

10 Q. So you don't have any problem with the fact they did that  
11 test.

12 A. No, sir.

13 Q. And you know they found that there's no change, but you  
14 argue with the fact that if it's -- it's within the margin of  
15 error and so there must have been some kind of change,  
16 according to you. Is that fair?

17 A. We saw it in the photographs. We saw the peeling  
18 material.

19 Q. But you never measured it.

20 A. No.

21 Q. And the only measurement of the mesh before and after the  
22 cleaning is by Dr. Thames and Dr. Ong, correct?

23 A. That's correct.

24 Q. Now, the real dispute between you and Dr. Thames is  
25 whether what you're seeing in this scanning electron

1 microscopy is cracked polypropylene, as you suggest, or  
2 whether it is this formaldehyde-protein cross-linked polymer  
3 that you didn't clean, correct?

4 A. Correct.

5 Q. And you looked at the same pictures.

6 A. We didn't correct it -- we didn't try to remove it with  
7 all those methods. We did remove the bulk with the forceps.

8 Q. I understand.

9 A. Okay.

10 Q. Well, Dr. Thames is of the position, of course, you  
11 didn't clean it well enough and what remains is the  
12 formaldehyde-protein cross-linked polymer and that's what you  
13 see cracking, correct?

14 A. That's what he's saying, yes.

15 Q. You disagree with that. What you think you're seeing is  
16 cracked polypropylene, correct?

17 A. Yes.

18 Q. And it's what you're seeing in the scanning electron  
19 microscopy that you believe is cracked polypropylene, correct?

20 A. Yes.

21 Q. But you've not tested that material by FTIR microscopy,  
22 have you?

23 A. The cracked material is exactly what we did test, and it  
24 came off the particle, came off the fiber.

25 Q. I'm sorry. Are you finished?

1 A. Yes. Sorry.

2 Q. You just testified a moment ago that you looked at the  
3 mesh through the scanning electron microscopy. You showed the  
4 jury pictures. You showed the jury pictures from Dr. Thames  
5 where he obviously takes the position what he's looking at  
6 there is the protein and the formaldehyde.

7 A. But he didn't look at the --

8 Q. Excuse me. Can I finish my question, please?

9 A. Okay.

10 MR. ANDERSON: Your Honor, can we have a sidebar,  
11 please?

12 SIDEBAR CONFERENCE

13 MR. ANDERSON: Your Honor, he is improperly trying  
14 to pit one expert's testimony against the other, and the other  
15 hasn't testified in evidence. So he's pulling out of the air  
16 that he disagrees with Dr. Thames and pits them against each  
17 other. They've never been in evidence --

18 THE COURT: He testified on direct examination when  
19 you made inquiry if he had relied on, read, and so forth  
20 Dr. Thames' and Ethicon's experts. So it's overruled.

21 MR. ANDERSON: You're talking about -- you're  
22 talking -- he's talking about doctor deposition testimony.

23 THE COURT: He said he reviewed the depositions too,  
24 I believe, didn't he?

25 MR. ANDERSON: I don't know that he did. I didn't

1 ask him about it.

2 THE COURT: He said he reviewed thousands of pages  
3 of depositions. And I'm asking you, are you saying he didn't  
4 review --

5 MR. ANDERSON: He did review it. We didn't inject  
6 the deposition in direct examination.

7 THE COURT: I overrule your objection. All right.  
8 You may continue.

9 BY MR. THOMAS:

10 Q. On direct examination you showed the jury the images of  
11 the mesh that had been taken by you and by Dr. Thames by  
12 scanning electron microscopy, correct?

13 A. Correct.

14 Q. And you testified that what you saw in the scanning  
15 electron microscopy is what you believed to be cracked  
16 polypropylene, correct?

17 A. Correct.

18 Q. My point, Dr. Jordi, is you never tested the material on  
19 that mesh depicted in that SEM to determine whether it's  
20 degraded polypropylene, correct?

21 A. I say that the particles that came off are the degraded  
22 material.

23 Q. It's a simple question. I asked you whether you tested  
24 the mesh. You tested a particle. You did not test the mesh,  
25 correct?

1 A. Yes.

2 Q. Is that correct?

3 A. Correct.

4 Q. Thank you.

5 THE COURT: Are you close to a place where we can  
6 take lunch?

7 MR. THOMAS: It's a good time, Your Honor.

8 THE COURT: All right. Ladies and gentlemen -- let  
9 me see counsel just at the bench for a second.

10 (Bench conference off the record)

11 THE COURT: As you can tell by the numbers of the  
12 witnesses and the subject matter of the case, logistics are an  
13 interesting phenomenon. As a consequence, I'm going to once  
14 again give you an hour and a half for lunch, and we may stop a  
15 little bit early today.

16 After that, I promise you that we will start at 9:00 and  
17 we will go to 5:00 if I have to sing and dance. So don't  
18 blame anybody. We're doing the best we can. And I don't  
19 suppose you'll really regret -- this is not going to lengthen  
20 the trial. The deadlines stay in place, okay? But I know  
21 some of you are fearful of the snow. When I watched the  
22 weather this morning, it looked like it's just going to barely  
23 miss us in Charleston if they know what they're talking about,  
24 which is a big if.

25 I think by the time we get out of here today, if we look

1 at our Smart phones or computers or whatever, we'll have a  
2 pretty good idea for planning on what you want to do this  
3 evening, and I know you've talked with the jury administrator  
4 about what your options are.

5 So let's go to lunch. If you all would come back at  
6 1:30, and we'll take up as soon thereafter as we can.

7 (Recess)

8 (Bench conference with the Mr. Cartmell and Mr. Combs)

9 MR. CARTMELL: Yesterday during Dr. Rosenzweig's  
10 testimony, Exhibit 803 was admitted with a redaction, and we  
11 have done that. We redacted it out. Today there is testimony  
12 of Dr. Isenberg related to the same document, and we are  
13 admitting 803 as redacted as the document in the testimony for  
14 Dr. Isenberg.

15 MR. COMBS: And that is correct, and it's just  
16 subject to the same objections we had yesterday that was  
17 admitted in regard to Dr. Rosenzweig, but that is our  
18 agreement.

19 (Recess)

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1           (In open court following the luncheon recess. The  
2 jury is not present.)

3           THE COURT: All right, Ms. Jones?

4           MS. JONES: I apologize, your Honor, I didn't  
5 see you sneak in here. Let me see if I can crystallize  
6 these things quickly.

7           First, your Honor, this arises because we have an  
8 objection that was stated in Ms. Angelini's deposition.  
9 The objection is from pages 4414 through the designated  
10 pages that run through page 55, line 16.

11           This testimony relates specifically to the documents  
12 that Ms. Angelini had reviewed in the context of preparing  
13 for her deposition. She's testified that she could not  
14 review all of the documents because she had left the  
15 company in 2005 and returned in 2006, and that during that  
16 time period her documents on her personal computer were  
17 lost.

18           There is a specific request in the midst of this  
19 testimony that's been designated that says there's a  
20 litigation hold company-wide at that time, did you know  
21 that, back in 2005. She said no. Back in 5. The  
22 question is yes.

23           I mean, I will tell your Honor that in an effort to  
24 try and resolve this, we offered to let everything be  
25 played, because she actually discusses the documents that



1     were not there. And I have this for your Honor. Other  
2     than the questions about the litigation hold notice, and  
3     that proposition was declined.

4             The reason that I think that this does not come in  
5     is -- I mean, they're several fold -- but first and  
6     primarily, so that we can deal with Ms. Angelini's  
7     deposition, is that as to Judge Eifert's ruling on the  
8     whole spoliation issue, she specifically found --

9             THE COURT: April, 2007?

10            MS. JONES: April, 2007. That's over a year --  
11     or two years after -- one or two years after  
12     Ms. Angelini's testimony is involved. So, for that  
13     reason, we object to that. It ought not to come in. It  
14     ought not to come in.

15            As to the broader issue, your Honor, on spoliation,  
16     I'll simply raise it because Mr. Freese has indicated that  
17     they intend to offer the deposition of Mr. Mittenthal.  
18     You will remember that Mr. Mittenthal is the corporate  
19     designee on what I will call the document preservation  
20     issues. He has been deposed repeatedly. His testimony  
21     was available for Judge Eifert. Judge Eifert issued her  
22     ruling considering his testimony.

23            Last week or two week ago, following the issuance of  
24     Judge Eifert's opinion, the plaintiffs requested leave to  
25     take a trial deposition. Judge Eifert allowed the

1 plaintiffs two hours, as your Honor had previously on some  
2 other issues, to take a trial deposition. It was not to  
3 be a discovery deposition. It was to be a trial  
4 deposition. That deposition was taken on Monday of this  
5 week.

6 That deposition, your Honor, revealed absolutely  
7 nothing different from what was before Judge Eifert and  
8 was considered by Judge Eifert.

9 Judge Eifert specifically held that in reviewing all  
10 of the documents, she found that there was no showing of  
11 prejudice in this case; that the plaintiffs could not  
12 point to anything specific that showed that a document  
13 material to their case was not produced, that there was  
14 absolutely no showing of an intentional act or bad faith  
15 or willfulness on the part of Ethicon.

16 She did leave open the possibility that plaintiffs,  
17 under certain circumstances, might seek additional  
18 evidence when you're dealing -- and the example that she  
19 gave was a failure to warn claim and there was a missing  
20 sales rep file.

21 In this case, we don't hold that or anything like  
22 that. There was absolutely no new evidence introduced in  
23 Mr. Mittenthal's deposition.

24 Judge Eifert, as I said, limited the deposition to,  
25 quote, reformat the testimony in a way that would make it

1 easier for the jury to understand, not to plow new ground.

2 Judge Eifert was clear in her original ruling that  
3 she saw no basis, from a prejudicial standpoint in the  
4 Lewis case, to warrant any type of adverse inference.  
5 And, in the absence of that, your Honor, the evidence is  
6 simply irrelevant to the issues before this case, and,  
7 under 403, certainly ought not to be admitted before the  
8 jury.

9 Judge, at the deposition of Mr. Mittenthal, the  
10 first part of it is devoted to discussion of the  
11 litigation holds that Judge Eifert actually considered.  
12 Judge Eifert obviously issued her ruling that found that  
13 the April 30, 2007, date was the applicable date, so that  
14 the 2003 hold notices in 2005 were not relevant for this  
15 time period.

16 We discussed the very same custodians that Judge  
17 Eifert considered. They did not make any attempt to  
18 really establish willfulness or bad faith. That did not  
19 establish prejudice. In fact, Judge, in the Mittenthal  
20 deposition, they asked Mr. Mittenthal to agree that it  
21 was, quote, possible that evidence pertaining to the  
22 design defect claim was lost. And Mr. Mittenthal pointed  
23 out that it is unlikely that key design documents were not  
24 produced because they were centrally maintained. They  
25 were not maintained by the custodians that are involved in

1 this case.

2 In short, your Honor, to allow this issue before the  
3 jury at this point in time would be a complete disregard  
4 of Judge Eifert's ruling and that there's been no  
5 prejudice or anything to warrant the submission of these  
6 issues to the jury in this particular case, because there  
7 is no showing that the plaintiffs had been in any way  
8 impacted by their ability to present a design defect  
9 claim.

10 THE COURT: All right. Counsel?

11 MR. FREESE: Thank you, your Honor. I have a  
12 very different viewpoint from Ms. Jones about this. And  
13 let me start by saying that Ms. Angelini, she is a little  
14 separate. I mean, she's talking about she had her  
15 documents from the company. She was there -- she was head  
16 of marketing in Europe for a large measure of time, had  
17 responsibility for all these European doctors that we've  
18 been hearing about. She leaves the company for one week,  
19 and they wipe out her hard drive. One week. She comes  
20 back for whatever reason -- decides to come back to the  
21 company, her documents are all gone.

22 The mere fact of the loss of her documents are an  
23 important issue. Doesn't have anything to do necessarily  
24 with adverse inference. But the fact that all these  
25 documents that have been lost is information that is

1 important to us and should be heard by the jury.

2 THE COURT: Why? What does it tend -- what  
3 does it tend to prove?

4 MR. FREESE: A number of things, your Honor.  
5 So, when -- I'll move ahead in my argument here. First of  
6 all, the documents that are lost include all the  
7 foundational documents, the design studies, the --

8 THE COURT: There is evidence that she was in  
9 possession of design studies?

10 MR. FREESE: Not that -- that Ethicon was, your  
11 Honor.

12 THE COURT: How about her?

13 MR. FREESE: Well, she --

14 THE COURT: I mean, what's the evidence that  
15 her hard drive had anything on it to do with the design of  
16 the product that we're dealing with?

17 MR. FREESE: Well, because that was her job,  
18 your Honor. I mean, she was the one in charge of --

19 THE COURT: The head of marketing, you said?

20 MR. FREESE: Yes. I was actually not talking  
21 about Ms. Angelini just now.

22 THE COURT: Okay --

23 MR. FREESE: I thought you said what's the  
24 prejudice --

25 THE COURT: Oh, no, no, no.

1 MR. FREESE: Oh.

2 THE COURT: I thought you started with.  
3 Angelini, and I was just asking about that.

4 MR. FREESE: Yes, sir. And with Ms. Angelini  
5 the answer is she had the full gamut of information on  
6 marketing and what -- what the sales reps knew and what  
7 they were doing at the relevant time that she was at the  
8 company. And now it's all gone. We don't have an  
9 opportunity to tell you what was in there. And she said,  
10 well, I don't remember. All my emails were in there. I  
11 told --

12 THE COURT: What would have been in the sales  
13 information about defective design?

14 MR. FREESE: What they knew about the  
15 complication rate. I mean, the documents produced in this  
16 case are filled with sales and marketing people  
17 interacting with engineering people, talk about how do we  
18 deal with these companies, known complications and  
19 correspondence with doctors back and forth. I mean, this  
20 is how the company operates. The scientists and the  
21 engineers and the marketing people all work in tandem with  
22 each other.

23 THE COURT: That's 2005 in Europe; right?

24 MR. FREESE: Yes, sir.

25 THE COURT: Let's go to --

1 MR. CARTMELL: It was --

2 MR. FREESE: I'm being corrected, your Honor.

3 MR. CARTMELL: Her testimony was everything  
4 before 2003 as far as the consultants and payments, and  
5 all that, was gone. Everything on her hard drive that was  
6 before 2005 was gone when she left for a week, and then  
7 she came back.

8 THE COURT: I mean, she left for a week on  
9 vacation? She was fired? She left the company? What?

10 MR. CARTMELL: She went to another company.  
11 She said it was not for her. And she came back a week  
12 later and her computer had been wiped.

13 MS. JONES: Well --

14 MR. FREESE: And let me say, Judge, this is why  
15 I was talking about -- there's two different categories of  
16 Angelini documents. She talks about her own hard drive,  
17 but she also speaks about documents company-wide that they  
18 no longer have. And they have a declaration from their --  
19 their internal control person talked about the documents  
20 they had, which --

21 THE COURT: You're losing me.

22 MR. FREESE: Okay. I'm sorry, Judge. I'm  
23 talking now about Ulmsten. All right.

24 THE COURT: All right, let's put Angelini aside  
25 and talk about the bigger issue.

1           MR. FREESE: Yes, sir. Yes, sir. I thought  
2 your Honor's question was what's the prejudice, and I'm  
3 explaining that Ulmsten --

4           THE COURT: I was trying to figure out what  
5 there was that -- somebody that left the company, I  
6 wouldn't find it terribly unusual that they wiped the  
7 computer and gave it to somebody else. But, be that as it  
8 may -- I mean, I don't see anything nefarious in the fact  
9 that she was only gone a week. She was gone from the  
10 company. She came back to the company. I would assume,  
11 regretfully, that when I leave the court, my hard drives  
12 will be unceremoniously wiped.

13           MR. FREESE: The different in her case, Judge,  
14 and what makes Ms. Jones' point all the more important is  
15 that at the time she left that company for that week there  
16 was, in fact, a litigation hold on her documents, her hard  
17 drive, everything she had.

18           And despite what Ms. Jones says, Mr. Mittenthal's  
19 deposition was taken this week, at Judge Eifert's  
20 instruction, and your Honor specifically said at the  
21 pretrial conference, his deposition will be read without  
22 cuts. It's a trial deposition. And remember your Honor  
23 very clearly said it will be played in its full format,  
24 without cutting at all and doing this. And we said that's  
25 fine.



1           Mr. Mittenthal made very clear -- very clear on  
2 Monday that the litigation hold at Ethicon and Johnson &  
3 Johnson worldwide was in effect from 2003 forward. There  
4 is no longer any question about that.

5           And I think, in Judge Eifert's order, she said it  
6 was uncertain, but she was sticking with the one that she  
7 felt most certain about, which was 2007. There is no  
8 longer any doubt about that. Okay?

9           But more importantly, more fundamentally, Judge  
10 Eifert found that there was a sanctionable conduct, which  
11 she awarded monetary penalties on. We're not asking to  
12 get that before the jury.

13           But she said she specifically reserved the right and  
14 was going to recommend to your Honor --

15           THE COURT: In a specific case, if warranted, I  
16 could give an instruction.

17           MR. FREESE: Recommend the presiding district  
18 judge allow plaintiffs -- we're the first bellwether case,  
19 so I assume we're plaintiffs -- the opportunity to  
20 introduce evidence regarding Ethicon's loss of relevant  
21 documents on a case-by-case basis, and, when appropriate,  
22 to tender an adverse instruction. We're not asking --

23           THE COURT: Appropriate documents, case-by-case  
24 basis. So, tell me about your -- tell me what are we  
25 fighting about?

1           MR. FREESE: Yes, sir, I'll tell you exactly  
2 what we're fighting about. To start with the Ulmsten  
3 documents, in 2005 and 2006 -- and they don't dispute  
4 this, Judge -- they had a pallet of 600 pounds of  
5 Dr. Ulmsten's -- all the Medscand documents. The studies,  
6 the patient-level data, the -- the -- I don't know if  
7 they're remnants -- the product he used to implant in  
8 women. And Medscand was going out of business. And they  
9 said we've got to figure out what to do with this stuff.  
10 Who wants it.

11           And there's a long discussion within the company  
12 about what -- Somerville, New Jersey, should get this  
13 part, some of that should stay here, some should be  
14 somewhere else. And on the parts of the design, the  
15 product --

16           THE COURT: The parts of the what?

17           MR. FREESE: I'll quote, your Honor, because  
18 they used a particular phrase.

19           THE COURT: Now, let's start with this  
20 premise: When we're talking about Judge Eifert, she said  
21 the duty to preserve started April 30, 2007.

22           MR. FREESE: Yes, sir.

23           THE COURT: Right?

24           MR. FREESE: And I respectfully think that now  
25 we know that that is not a correct date; that

1 Mr. Mittenthal has made clear that it's 2003. From that  
2 date forward, it was an unbreaking line of legal  
3 obligation to maintain --

4 THE COURT: So, tell me precisely what it is  
5 that Mr. Ulmsten said in his deposition that makes you  
6 believe that they had a duty to preserve all documents  
7 related to TVT, TVT-O, and the design thereof, beginning  
8 in 2003? What specifically did he say?

9 MR. FREESE: Well, the deposition is being  
10 delivered to us as we speak, your Honor, so I can't --

11 THE COURT: I can't rule on it if I don't know  
12 what it is.

13 MR. FREESE: Your Honor, I'm sorry. I don't --  
14 I don't -- I've read it. I've read the dep -- what he  
15 says in his deposition, your Honor, is that from 2003  
16 forward, every -- from design, marketing, planning -- it's  
17 an extraordinarily encompassing -- it would cover any  
18 possible TVT document, your Honor, from 2003 forward.

19 And Ms. Warren, who's in the courtroom, signed the  
20 letter. She could tell you, because she was the one who  
21 signed the letter saying everything that's TVT must be  
22 protected. We're involved in litigation. If we don't  
23 preserve it, we can be held responsible for not preserving  
24 it. It had everything about design, product, everything.

25 And Mr. Mittenthal testified from 2003 forward that

1 was an unbroken chain, and there were multiple litigations  
2 after that.

3 THE COURT: Okay, let's jump way forward,  
4 because I need to know what Mittenthal said if I am to  
5 deal with a new motion on spoliation based on his  
6 testimony.

7 But, skipping past that for just a moment, assuming  
8 that there was spoliation --

9 MR. FREESE: Yes, sir.

10 THE COURT: -- what would you have me do about  
11 it in this case and why would you have me do it?

12 MR. FREESE: Okay. At this time, your Honor,  
13 all I want to do is for you to allow me to put the  
14 evidence in of the destruction of the documents. I'm not  
15 asking for anything further. I'm not asking you to change  
16 Judge Eifert's ruling. This is something that I'm going  
17 to come back to you after the close of this case and ask  
18 you, once you've heard all the evidence.

19 But right now we are simply asking you to let us  
20 have Ms. Angelini talk about what happened to her  
21 documents, what happened to the documents of the company,  
22 and let Mr. Mittenthal tell the jury what documents were  
23 destroyed, when they were destroyed, and when the company  
24 had notice of a litigation hold, that they were  
25 responsible to keep those documents.

1           And, if I might, your Honor, let me tell you the  
2           prejudice to us. Because at the time of Judge Eifert's  
3           ruling we hadn't had a trial.

4           THE COURT: She said there was no prejudice.

5           MR. FREESE: So, now we have a trial, your  
6           Honor. So the key foundational documents of Ulmsten, the  
7           patient-level data, is gone. Well, guess what we heard in  
8           the trial? Ms. Jones stands up, from the moment this  
9           trial started, in opening statement, and says it was a  
10          remarkable breakthrough what this man from Sweden did for  
11          hundreds of thousands of women in this country. He came  
12          up with the greatest thing that's ever been known. And we  
13          don't have a single one of the documents to say whether  
14          it's true or not.

15          Mr. Isenberg, this morning, the medical affairs  
16          director, said, on their direct examination, Dr. Isenberg,  
17          tell us about Dr. Ulmsten. Oh, did you find his studies  
18          impressive? Yes, they were impressive. I met doctor -- I  
19          saw his stuff. It was wonderful.

20          Well, guess what, Judge? We don't have Dr. Ulmsten.  
21          God rest his soul, he's not with us anymore. We don't  
22          have his deposition, and, thanks to Ethicon, we don't have  
23          his documents.

24          THE COURT: And when were they destroyed?

25          MR. FREESE: Well, they were destroyed sometime

1 between 2006 and the present. And we know that from the  
2 email from the woman who's trying to figure out what to do  
3 with 600 pounds of Dr. Ulmsten's pallet of all the  
4 Medscand documents. So, we know, as of 2006, Ethicon had  
5 the documents in their control. They weren't in  
6 Medscand's file. They were now in the control of  
7 Ethicon. Okay? And they were figuring out what to do  
8 with those. And what they said is we'll send some here  
9 and we'll send some there, and the rest we'll chuck.  
10 That's a quote, your Honor. They said, we'll chuck.

11 THE COURT: First, the uncontroverted evidence  
12 is that Ulmsten's files became the property of Ethicon at  
13 some point prior to 2006; is that right?

14 MR. FREESE: That is correct, your Honor.

15 THE COURT: And that sometime in 2006 up to  
16 2007, while Ethicon had those documents as their property,  
17 they destroyed them. Is that --

18 MR. FREESE: That is correct. And we know they  
19 had them, because we had emails talking about the 600  
20 pound pallet of the mess they got, and now, in 2014, they  
21 are nowhere.

22 THE COURT: Do we even know what they were  
23 about? What evidence do we have -- do we have any idea --

24 MR. FREESE: We have the email describing what  
25 was in pallet.

1 THE COURT: Okay. What's it say?

2 MR. FREESE: It says it was design documents,  
3 it was patient-level data, it was the clinical trials that  
4 have been referenced many times in this trial. It  
5 references the product. The best I could tell, the phrase  
6 they're using -- they called it -- it appears to be  
7 referencing the product that Dr. Ulmsten was implanting in  
8 these women in Europe and putting in his studies.

9 All the stuff they talked about that was the  
10 foundational -- the foundational studies and work done by  
11 Dr. Ulmsten that was in their possession is now gone, and  
12 they were -- and we're getting whip-sawed by it, Judge,  
13 because they're standing up and saying he's the greatest  
14 thing that's ever happened --

15 THE COURT: And there is some specific  
16 litigation hold in place that references or is applicable  
17 to the Ulmsten documents; correct?

18 MR. FREESE: Absolutely. No question about it,  
19 Judge.

20 THE COURT: All right. And who put that in  
21 place? What legal department? What person?

22 MR. FREESE: Ms. Warren, sitting in the back of  
23 the courtroom.

24 THE COURT: Okay. Let my hear back from the  
25 other side on that.

1 MR. FREESE: Oh. I'd be happy to tell you  
2 about more prejudice, but if you want --

3 THE COURT: Go ahead. Go ahead.

4 MR. FREESE: Yes, sir. So, the next thing  
5 about Dr. Ulmsten -- now we're just talking about his  
6 scientific and medical stuff. Let's talk about the  
7 payments to Dr. Ulmsten. His company was paid \$25  
8 million. Okay? He was a 20% owner in Medscand. Now, we  
9 can speculate how much of the \$25 million. We know he was  
10 a 20% owner, and his company was paid \$25 million.

11 He was also paid \$400,000 for each study that he  
12 produced --

13 MR. CARTMELL: We only know about the 1998  
14 study.

15 MR. FREESE: No, we -- we know of one study  
16 that he -- the offer was for any study that he would  
17 submit. \$400,000 per study if the study met certain  
18 safety rates and success rates, as dictated by Ethicon,  
19 before the study was ever created. Okay? And there was a  
20 whole other issue about --

21 THE COURT: What does that have to do with  
22 spoliation?

23 MR. FREESE: Well, I'll tell you, your Honor.  
24 So, now we -- we don't have the documents to look at. We  
25 know that he --



1 THE COURT: You don't have the documents  
2 regarding what to do with the 400,000?

3 MR. FREESE: In addition to those scientific  
4 documents and medical documents, financial documents were  
5 destroyed, your Honor. The payment history to  
6 Dr. Ulmsten --

7 THE COURT: Is there a dispute that he was paid  
8 the \$400,000?

9 MR. FREESE: Well, there is, in the sense that  
10 there is a document -- there's a licensing agreement that  
11 we have, that we've showed many witnesses. And they say,  
12 I see it. What was he paid? I don't know. It says he  
13 was paid. I don't know, though.

14 MR. CARTMELL: Do you mind?

15 THE COURT: No.

16 MR. CARTMELL: Just because I took this  
17 deposition. There is no dispute that he was paid  
18 \$400,000. We don't know if he was paid more than that,  
19 because they said the documents were lost. So any payment  
20 information before 2003 is lost. But they know he was  
21 paid \$400,000 for the '98, and they knew that he was  
22 paid.

23 THE COURT: So, you would want to show that  
24 because documents regarding finances were lost, he might  
25 have been paid had more than \$400,000?

1           MR. CARTMELL: For each study. Right. I said  
2 to Ms. Angelini, I said, do you know whether or not she's  
3 paid for each study. She said, no, I know about '98. And  
4 I said, well, then, you don't know if you lost the  
5 document. She said right.

6           THE COURT: Right.

7           MR. FREESE: So, we got that. And I need to  
8 ask your Honor, no further than Mr. Thomas' cross-  
9 examination of Prof. Klosterhalfen about how effective one  
10 could be on a cross-examination if you show the financial  
11 stake of someone who's trying to put forward scientific  
12 evidence. And they got Dr. Klosterhalfen in there to  
13 start talking about, well, you get a 1% royalty on this  
14 PVDF and --

15           THE COURT: You're not going to be able to --  
16 even if you say that these documents are destroyed, you're  
17 only going to be able to say you don't know what he was  
18 paid. You're not going to be able to speculate he was  
19 paid a particular amount.

20           MR. FREESE: Well, your Honor, the reason we  
21 can't tell a particular amount is because they destroyed  
22 the documents. That's the reason we don't -- I mean, I  
23 would love to tell the jury that Dr. Ulmsten was paid \$2  
24 million, \$5 million.

25           THE COURT: I understand, but the best you're

1 going to get would be -- and I'm not saying you are -- was  
2 that the documents, these financial documents, were  
3 destroyed, and that would include records having to do  
4 with his payment for clinical studies.

5 MR. FREESE: Absolutely, your Honor. That --  
6 that is what I want.

7 MR. CARTMELL: I just don't want you to be  
8 misled. She did testify that he was paid \$2,128,000.  
9 They know that. But they just don't know, the other  
10 documents that were lost, if it was more than that.

11 MR. FREESE: So --

12 THE COURT: Well, you've got it to \$2,100,000.

13 MR. FREESE: Well, but you know, Judge, the  
14 bias is almost unlimited. You know, if he was paid \$2  
15 million -- if we know about \$2 million, and he might have  
16 been paid four or ten, if we had the documents, that's an  
17 extraordinary amount of prejudice to us if we can't prove  
18 that and they had the information, yet allowed them to be  
19 destroyed when there was no question a litigation hold was  
20 in effect.

21 My next prejudice, Dr. Nilsson. You've heard about  
22 Dr. Nilsson in opening statement. You've heard about  
23 Dr. Nilsson in cross-examination. Ms. Jones had  
24 Dr. Nilsson's 17-year study in front of Dr. Rosenzweig,  
25 and was saying, look at what Dr. Nilsson has done.

1 THE COURT: So, what -- tell me -- tell me  
2 about this.

3 MR. FREESE: Dr. Nilsson is a paid consultant  
4 for Ethicon.

5 THE COURT: Uh-huh.

6 MR. FREESE: And, once again, your Honor, they  
7 have lost the financial records showing the payment to  
8 Dr. Nilsson.

9 THE COURT: Is he still around?

10 MR. CARTMELL: Yes.

11 THE COURT: Did you ask him how much he got  
12 paid?

13 MR. CARTMELL: He has not -- he's in  
14 Scandinavia and he has not been deposed.

15 THE COURT: Okay.

16 MR. FREESE: But they don't dispute that he was  
17 paid, your Honor. They simply say we don't know how much  
18 he was paid, and we don't know over what period of time  
19 he's paid. But, nevertheless --

20 THE COURT: Let me just stop -- I'm not a jury.

21 MR. FREESE: Yes, sir.

22 THE COURT: You're doing a good jury speech.

23 MR. FREESE: All right. I'll stop. You  
24 understand the significance of us having --

25 THE COURT: I understand.

1 MR. FREESE: Yes, sir. I'll stop there, I  
2 think, on the prejudice, Judge, but I think you get a  
3 flavor for what we're talking about here. And so, we're  
4 not asking your Honor to THE COURT: us do anything other  
5 than put before the jury the fact of this obstruction.  
6 They've been --

7 THE COURT: And then stand up during closing  
8 argument and say, God knows how much they were paid.  
9 Right?

10 MR. FREESE: Well, I mean, and I might convince  
11 your Honor to give us an adverse in its instruction. I  
12 don't know, but I'm not asking for that right now. I'm  
13 simply asking at this point that at the trial we be at  
14 least permitted to tell the jury that these potential  
15 biases exist.

16 And THE COURT: me tell you why that's important.  
17 Dr. Hart, who we play sometime, hopefully tomorrow, is  
18 testifying. He was -- he was the chief medical affairs  
19 officer for Ethicon.

20 THE COURT: We've got to hurry up.

21 MR. FREESE: Yes, sir. He was the chief  
22 medical affairs officer for Ethicon. And I took his  
23 deposition a couple months ago. And he said, yes, if we  
24 paid doctors and investigators, that immediately would put  
25 bias, it would put doubt into the credibility of our

1 studies.

2 THE COURT: And you've been bringing that out.

3 MR. FREESE: Sir?

4 THE COURT: I've heard that. I've heard that.

5 MR. FREESE: Yes, sir. Again -- and we're  
6 going to bring it out some more. But you said what  
7 arguments are we going to make. Once the jury hears  
8 Dr. Hart, we're going to tell them, see, even they agree  
9 that these studies that they've paid for -- and we just  
10 don't know the enormity of the payments or for how long  
11 they lasted. That -- that is, in fact, the prejudice.  
12 And, again, you know, the medical studies.

13 I'd go on, but I think your Honor has heard me  
14 enough. I don't know if they want to respond, but -- do  
15 you have any other questions, Judge?

16 THE COURT: No, I'm not going to ask.

17 MR. FREESE: Okay.

18 MS. JONES: Your Honor, we are simply rearguing  
19 what was reargued before Judge Eifert. Judge Eifert says,  
20 on page 37 --

21 THE COURT: On which page?

22 MS. JONES: I'm sorry?

23 THE COURT: Which page, I'm sorry?

24 MS. JONES: Thirty-seven. "At the hearing,  
25 plaintiffs were asked to elucidate the effects of the

1 missing evidence on their ability to prosecute their  
2 claims. Plaintiffs describe the difficulties they had  
3 encountered in fleshing out the events of 2006 through  
4 2009," and she goes forward.

5 So, all we're asking your Honor to do is to  
6 completely reverse Judge Eifert, who considered this  
7 matter and all of the briefs and all of the documentation  
8 and all of the submissions before it, number one.

9 Number two, they're specifically asking your Honor  
10 to overrule Judge Eifert, who found that the triggering  
11 date for preservation was April 30, 2007 --

12 THE COURT: What about this fellow's recent  
13 deposition and --

14 MS. JONES: I'm sorry?

15 THE COURT: The deposition that was recently  
16 taken, where they have a witness who says new information  
17 concerning --

18 MS. JONES: No, your Honor.

19 THE COURT: -- when there was a hold.

20 MS. JONES: No, your Honor. Judge Eifert  
21 specifically said to the plaintiffs, you may take a trial  
22 deposition and you may cover everything that's been  
23 covered and put it in a format for a trial deposition.  
24 But it is not a discovery deposition. And there is  
25 absolutely not one word of new information in the trial

1 deposition by Dr. --

2 THE COURT: THE COURT: me just stop you right  
3 there. What new information was in the trial deposition.

4 MR. FREESE: I have it right here, your Honor,  
5 It just got delivered. Page 712, Mr. Mittenthal -- may I  
6 approach, your Honor?

7 THE COURT: Yes, but please slow down.

8 MR. FREESE: I'm sorry, I get talking fast.

9 I just refer your Honor to page 712, lines 16  
10 through 20 of the question and answer of Dr. Mittenthal --  
11 or Mr. Mittenthal.

12 MS. JONES: I'd like to respond, your Honor,  
13 when you finish.

14 THE COURT: All right, you may respond.

15 MS. JONES: And what they're asking you to do  
16 is to ask -- is to reverse Judge Eifert's opinion that  
17 says that the triggering date is April, 2003, when Judge  
18 Eifert specifically considered that in her opinion.

19 THE COURT: On page 13, she did.

20 MS. JONES: That's right.

21 MR. FREESE: Your Honor, the deposition didn't  
22 exist at that time. I don't know how she --

23 THE COURT: No, but she specifically considered  
24 that Dr. Mittenthal testified the existence of a  
25 litigation hold as early as 2003. She considered that.



1 MR. FREESE: And now Mr. Mittenthal has  
2 confirmed that it was 2003, and I now have the exhibit,  
3 your Honor, what was ordered to be -- what was ordered to  
4 be held by Ethicon from 2003 forward. And if I could  
5 approach, your Honor, I'd like to show you the litigation  
6 hold and show you the significance and the breadth.

7 THE COURT: Is this something she's seen?

8 MR. FREESE: This is the 2003 hold.

9 THE COURT: Had she seen that?

10 MR. FREESE: I believe she had, your Honor.

11 THE COURT: You want me to look at it again?

12 MR. FREESE: Well, you had asked me  
13 specifically --

14 THE COURT: I mean, I do read this stuff when  
15 it comes in.

16 MR. FREESE: I mean, I had it. I was  
17 embarrassed that I didn't have it earlier.

18 THE COURT: What I'm asking you all to do is  
19 calm down. That's what I'm asking you to do.

20 MR. FREESE: Thank you, your Honor.

21 THE COURT: All right.

22 Look, I want the defendant's answer on Judge  
23 Eifert's order and its effect on the Ulmsten documents.  
24 That is to say that the Ulmsten documents were, in fact,  
25 destroyed, involving clinical trials, design documents and

1 patient-level documents.

2 MS. JONES: Your Honor, I'm going to be honest  
3 in that I would need to respond specifically. My  
4 understanding is that exactly what those documents are  
5 that they had from Medscand -- Medscand had not been  
6 specifically identified. There is a palTHE COURT: that  
7 weighed 600 pounds. You would think that there was a  
8 significant number of product involved in it. Exactly  
9 what that was and what was in it, piece by piece, is  
10 unknown, but all of that happened before the triggering  
11 date.

12 And I would be happy, as quickly as I can, if your  
13 Honor wants to know, to get the specifics of the  
14 deposition cites and the documents for you. I just don't  
15 have the details of that right this minute.

16 THE COURT: All right.

17 MR. FREESE: And, your Honor, I think I've got  
18 it here --

19 THE COURT: Here's the -- Judge Eifert found no  
20 evidence of intention or bad faith in the destruction of  
21 any documents. Am I correct?

22 MR. CARTMELL: She has -- at this point -- at  
23 the point that she has before the evidence was taken --  
24 and I'm not asking your Honor to undo anything Judge  
25 Eifert's done. Ms. Jones keeps saying that, but I'm not

1 asking you to undo it.

2 THE COURT: But what she said, and I adopt, and  
3 I hereby adopt, and ratify, confirm, and order her ruling  
4 to be a part of this trial as if it were my own, and it  
5 is.

6 What is it specifically that you want to do that  
7 she said could be done? That is to say, she said certain  
8 relevant documents in an appropriate case such, as a  
9 failure to warn case, where sales materials and records  
10 were missing, if I recollect. I don't have it in front of  
11 me.

12 Tell me what it is here you want. Because you  
13 were -- you're a good advocate, but the vigor with which  
14 you were advocating was obscuring what I was trying to get  
15 from you, and that is what do you want?

16 MR. FREESE: What we want is to read  
17 Ms. Angelini's deposition, as has been shown to you. We  
18 want to read Mr. Mittenthal's deposition, in toto, as your  
19 Honor said at pretrial conference, no cutting. Take it.  
20 We can ask what we want. They can ask what they want.  
21 And that is the best we can do with trying to explain what  
22 is missing.

23 THE COURT: And what do you say to that?

24 MS. JONES: I say to that, your Honor, is that  
25 it extends the trial, that it's totally irrelevant, it has

1 nothing to do with the plaintiffs' claims in this case.  
2 And if you look at -- I can show you exactly what  
3 Ms. Angelini testified about the documents that are  
4 missing from her computer.

5 THE COURT: Well, that will be helpful, because  
6 that's the one thing that I haven't seen, or, if I did, it  
7 got lost in the heap.

8 MS. JONES: So, I will show you exactly what  
9 she says to that, and then I think that what I will say as  
10 to Mr. Mittenthal's deposition is that it's simply  
11 irrelevant --

12 THE COURT: Yes --

13 MS. JONES: -- under 403. It doesn't come in.  
14 It doesn't serve to prove any fact in evidence in this  
15 case.

16 THE COURT: I don't -- I don't see any problem  
17 with reading exactly what she said. I don't see anything  
18 nefarious about it. And I'm not going to allow argument  
19 that there was anything nefarious about it. She said,  
20 when she came back, the documents weren't there. That can  
21 come in.

22 MS. JONES: Your Honor, I have -- the issue is  
23 specifically that she was asked on the next page, that you  
24 didn't get to.

25 THE COURT: I didn't see that.

1 MS. JONES: There was a litigation hold  
2 company-wide at the time.

3 THE COURT: I'm not going to get into that.  
4 I'm not going to allow it.

5 MS. JONES: Thank you, your Honor.

6 THE COURT: Now, I'm still concerned -- and I'm  
7 going to take under advisement -- I'm going to get this  
8 jury back here and we're going to get back on this trial.

9 MR. FREESE: Yes, sir.

10 THE COURT: I'm going to consider this. I'm  
11 going to go back and look at her report, and I'm going to  
12 think about this Mittenthal 600 pounds or 16 tons,  
13 whatever it was --

14 MR. FREESE: Yes, sir.

15 THE COURT: -- of documents. And to the extent  
16 you have information relevant to that, get it to me. Have  
17 some of your minions get it to my law clerks ASAP.

18 MR. FREESE: And, your Honor, I have the list  
19 here of what was on the palTHE COURT: . Do you want to  
20 now, or I can give it to Robin.

21 THE COURT: If that's what you want to give to  
22 my law clerk, give it to them.

23 MR. FREESE: Yes, sir.

24 THE COURT: Otherwise, just get to Sean or to  
25 Kate the information on the Mittenthal documents. I am

1 not playing his deposition.

2 Now, THE COURT: 's go.

3 (The jury returned to the courtroom.)

4 Please be seated. I'm sorry.

5 MR. ANDERSON: Can he take the stand?

6 THE COURT: Sure.

7 (Howard Jordi returned to the witness stand.)

8 All right, Mr. Thomas, you may proceed.

9 MR. ANDERSON: Can you put it back where it was  
10 so we can see it, too?

11 MR. THOMAS: Yes. I'm sorry.

12 THE COURT: Yes.

13 MR. ANDERSON: I can help you.

14 (Mr. Thomas placing chart before the Court and  
15 jury.)

16 MR. ANDERSON: Thank you.

17 THE COURT: You may proceed.

18 BY MR. THOMAS:

19 Q. Good afternoon, Doctor.

20 A. Good afternoon.

21 Q. You showed the jury a number of photos this morning of  
22 scanning electron microscopy?

23 A. Yes.

24 Q. And you showed the jury pictures of mesh fibers under  
25 scanning electron microscopy?

1 A. Correct, yes.

2 Q. And could you tell the jury, please, what it means to  
3 have something magnified 350 times?

4 A. It just blows it up to look 350 times bigger than it  
5 is life size.

6 Q. Okay.

7 MR. THOMAS: So, can you bring up page 20 --  
8 excuse me, Exhibit 20, page 115, of Dr. Jordi's report,  
9 please? Exhibit 20, page 115. I believe that was in  
10 the -- I thought that you were going to put up -- thank  
11 you.

12 THE COURT: THE COURT: me remind both sides  
13 again, if, at the end of this trial, you haven't gotten  
14 all the transcripts which you should have submitted before  
15 the witness testified, and your exhibits properly recorded  
16 with the courtroom deputy, I will not grant a motion to  
17 supplement the record. You're on notice.

18 BY MR. THOMAS:

19 Q. Dr. Jordi, do you remember showing this to the jury  
20 this morning?

21 A. Yes.

22 Q. And SEM Figure 4 is a pristine sample; correct?

23 A. Correct.

24 Q. And SEM Figure 4 shows a magnification of 350 times?

25 A. Correct.

1 Q. And so, the image that the jury is seeing there is 350  
2 times the actual size of that fiber; correct?

3 A. In the bottom photo, yes.

4 Q. And you've testified earlier about the surface  
5 cracking that you believe that you saw in the scanning  
6 electron microscopy to be about three, three-and-a-half  
7 microns?

8 A. That's the dimensions put on by Dr. Thames in his  
9 photo.

10 Q. Do you agree with that?

11 A. I agree with it.

12 Q. And so, three-and-a-half microns is three-and-a-half  
13 thousandths of a millimeter; correct?

14 A. Something on that order.

15 Q. Okay. And how wide is a human hair? About 60  
16 microns?

17 A. I think it's about 60, yeah.

18 Q. Sixty microns. So, when you're talking about 3.5  
19 microns, you're talking about 1/20th or so the size of a  
20 human hair, aren't you?

21 A. Approximately.

22 Q. Certainly not something you can see with the naked  
23 eye?

24 A. No.

25 Q. Now, earlier this morning we were talking about the



1 use of sodium hypochlorite and nitric acid, and your  
2 criticisms of Dr. Ong and Dr. Thames in their use of those  
3 materials to clean the mesh. Do you remember that?

4 A. Yes.

5 Q. And is your concern that the use of those materials  
6 may cause the polypropylene mesh to degrade? Is that  
7 correct?

8 A. Correct.

9 Q. It's true that you don't have an opinion as to whether  
10 the nitric acid used in the preparation of the Carolyn  
11 Lewis mesh sample damaged the polypropylene in the  
12 explant, do you?

13 A. I do have an opinion.

14 Q. Well, THE COURT: me bring up are deposition, first;  
15 volume 2, page 142, lines 19 to 25.

16 MR. ANDERSON: Volume 2, did you say?

17 MR. THOMAS: I did. Do you need a copy?

18 MR. ANDERSON: You were talking fast. Just the  
19 page and line?

20 MR. THOMAS: Page 142, 19 to 25.

21 BY MR. THOMAS:

22 Q. And the question I asked you a couple weeks ago:

23 "Do you have an opinion to a reasonable degree of  
24 scientific certainty that the nitric acid used in the  
25 preparation of the Carolyn Lewis mesh sample damaged the

1 polypropylene?

2 "ANSWER: Without testing, further testing at  
3 various levels, I can't answer the question."

4 Is that the answer you gave to the question at the  
5 time? Did I read that correctly?

6 A. Yes.

7 Q. And it's true, isn't it, that you don't have an  
8 opinion whether the sodium hypochlorite used in the  
9 preparation for the Carolyn Lewis mesh sample damaged the  
10 polypropylene in the explant?

11 A. I can't -- I can't say that's right. I've got to  
12 explain myself.

13 Q. Well, THE COURT: me take you back to your deposition  
14 again. Same day, volume 2, page 141, line 23, to 142,  
15 line 6.

16 "And THE COURT: me ask the question this way," is  
17 the way it reads. "Is it fair to understand that you do  
18 not have an opinion to a reasonable degree of scientific  
19 certainty that the sodium hypochlorite used in the sample  
20 preparation for the Carolyn Lewis mesh sample damaged the  
21 polypropylene in that sample?

22 "Yes, it's impossible for me to answer that  
23 definitively. I can only say it may have."

24 Did I read that correctly?

25 A. You read it correctly.

1 Q. All right. Now, the nitric acid that was used to  
2 treat the polypropylene was a 70% nitric acid solution?

3 A. Seventy percent.

4 Q. And it's true, isn't it, that if a person drank that  
5 amount of nitric acid, it would kill them?

6 A. Yes.

7 Q. We've talked before about polypropylene is a polymer;  
8 correct?

9 A. Correct.

10 Q. And polypropylene is a specific chemical molecule;  
11 correct?

12 A. Yes.

13 Q. And if the molecular structure of polypropylene is  
14 broken by degradation, the molecular weight of that  
15 molecule will be lower? True?

16 A. Generally, but it doesn't have to be always.

17 Q. Well, isn't it true that molecular weight is often a  
18 crucial factor in determining mechanical properties?

19 A. Yes.

20 Q. Now, if hydrogen peroxide had caused the degradation  
21 in this polypropylene mesh, there would be a change in the  
22 chemical structure of the mesh, wouldn't there?

23 A. Yes.

24 Q. And if there was a free radical that degraded this  
25 mesh, there would be a change in the chemical construction

1 of the polypropylene mesh?

2 A. Yes.

3 Q. The molecular weight analysis that you did on this  
4 mesh showed no change in molecular weight, didn't it?

5 A. In a gross sense, that's true.

6 Q. Okay. And, as a matter of fact, you've told us that  
7 the molecular weight analysis that you did on this mesh is  
8 not consistent with oxidation of the mesh?

9 A. The gross molecular weight or lack of gross molecular  
10 weight change is. However, we have the same --

11 Q. Is that true?

12 A. Yes.

13 Q. It's true that the molecular weight analysis that you  
14 did on this mesh is not consistent with oxidation of the  
15 mesh; true?

16 A. In a gross sense, that's true.

17 Q. Okay. Now, THE COURT: 's go to Plaintiff's Exhibit  
18 1291, please. And do you have that in front of you? 1291  
19 is a seven-year dog study you talked about this morning.  
20 Do you remember that?

21 A. Yes.

22 Q. And you've reviewed this before; correct? Before  
23 today?

24 A. Yes.

25 Q. THE COURT: 's go to a page that you talked to the

1 plaintiffs about. I believe it's page 187. It's 115,  
2 Jamie.

3 And this is October 15th, 1992, and you talked about  
4 the findings in that study. Under IV and GPC, down  
5 towards the bottom of that page, it talks about IV and  
6 GPC, and gel permeation chromatography. That's a test  
7 used to determine molecular weight, isn't it?

8 A. Yes.

9 Q. And it says, in the second sentence, "The GPC data was  
10 compared to data from a current 4/0 Prolene suture. The  
11 results indicate that there was no significant difference  
12 in molecular weight between the 4/0 Prolene control and  
13 the seven-year explants."

14 Did I read that correctly?

15 A. Did you.

16 Q. That means that there was no significant change in  
17 molecular weight over the seven years that these Prolene  
18 explant -- Prolene sutures were in these dogs; correct?

19 A. But you're not looking at the surface here, you're  
20 only looking at the total.

21 Q. Did I read that correctly?

22 A. I would read that as total sample, yes.

23 Q. Okay. Does it say total sample? That's what it says,  
24 doesn't it? There was no -- it says, "The results  
25 indicate that there was no significant difference in

1 molecular weight between the 4/0 Prolene control and the  
2 seven-year explants."

3 That's what it says, isn't it?

4 A. Yes.

5 Q. No change in molecular weight. No significant change.

6 THE COURT: 's go now to page 218, please, in the  
7 Bates number, the last three numbers. It's page 146,  
8 Jamie.

9 MR. ANDERSON: I'm sorry, counsel, what was  
10 your --

11 MR. THOMAS: Bates number 218.

12 BY MR. THOMAS:

13 Q. And Bates number 218 is an analytical chemistry  
14 department report. Do you see that?

15 A. Yes.

16 Q. And it's date submitted of June 23, 1992. Do you see  
17 that?

18 A. I do.

19 Q. And down to the bottom of the page there is a  
20 molecular weight analysis of the Prolene suture. Do you  
21 see that?

22 A. I do.

23 Q. And it says, "Prolene site 1, Prolene site 6," and it  
24 has molecular weight and molecular numbers entered. Do  
25 you see that?

1 A. I do.

2 Q. And underneath, under conclusions and comments, it  
3 reads, "Comparison of seven-year explants to current 4/0  
4 Prolene sutures indicates no significant degradation."

5 Is that true? That's what it reads, isn't it?

6 A. In a gross sense, yes.

7 Q. It's the same seven-year dog study you talked about  
8 this morning; correct?

9 THE COURT: 's go to page 148, Jamie.

10 And this is the second page of an analytical  
11 chemistry report containing some more molecular weight  
12 testing down at the bottom, same place. And you see there  
13 where they're doing molecular weight analysis for dog  
14 1995?

15 A. I do.

16 Q. And the conclusion reads, "Results indicate no  
17 degradation has taken place." Do you see that?

18 A. Yes.

19 Q. And that's the same seven-year dog study you were  
20 talking about this morning; correct?

21 A. Right.

22 Q. And there's another one on 149. 149, at the bottom of  
23 the page, again, same place. This is for a different  
24 dog. They're looking at sutures explanted from seven  
25 years, molecular weight analysis. And under conclusions

1 and comments do you see what it says? "Comparison of  
2 seven-year explants to current Prolene indicate no  
3 molecular weight degradation."

4 A. In a gross sense, yes.

5 Q. And there's more. Page 150. 150, you see the  
6 molecular weight testing right there in the middle of the  
7 page, right above Robin Rowling's signature. Do you see  
8 that, for Prolene?

9 A. Yes.

10 Q. And the conclusion reads, again, "Comparison of  
11 current Prolene 4/0 suture indicates no significant  
12 degradation of seven-year explant."

13 Read that correctly?

14 A. Yes, sir.

15 Q. And another part of the analysis for degradation is  
16 breaking strength or tensile strength. You'd agree with  
17 that, wouldn't you?

18 A. Yes.

19 Q. And on page 153 of this same set of documents, they do  
20 a tensile or breaking-strength analysis of these sutures,  
21 don't they? Have you read that?

22 A. Yes.

23 Q. Now, on page 153, right in the middle, if you look at  
24 the title of it, it says, "Interim report on the physical  
25 testing of Prolene PVDF Ethilon and Novafil after seven-



1 year subcutaneous implantation in the beagle dogs,  
2 ten-year BSR study."

3 Do you see that?

4 A. I do.

5 Q. And right in the middle of the page they start with  
6 Novafil samples. Do you see that? They talk about  
7 Novafil samples showing a decrease of 14% in breaking  
8 strength.

9 Do you see that?

10 A. I do.

11 Q. And then it goes on to say, "Prolene and PVDF show no  
12 significant change after seven years of implantation."

13 Correct?

14 A. That's what it says.

15 Q. And the conclusion of this report is, after seven  
16 years, that Prolene shows no significant change in  
17 breaking strength after seven years; correct?

18 A. Yes.

19 Q. Now, Doctor, you've talked at length today about how  
20 you think that the Ethicon polypropylene mesh has surface  
21 cracks, and that's evidence of degradation. Now, you're  
22 not able to determine how long that mesh may have been  
23 cracked, are you?

24 A. No.

25 Q. And there's -- there's no way for you to

1 quantitatively measure the extent of any cracking in the  
2 mesh, is there?

3 A. Just to physically look at it and see that it is.

4 Q. Yes. As a matter of fact, you're not able to measure  
5 the amount of oxidation that may be on the mesh  
6 quantitatively, are you?

7 A. We're able to see it through infrared spectroscopy of  
8 the particles, themselves, that are oxidized. They're  
9 flaked off.

10 Q. But -- but you're not able to measure the extent to  
11 which the mesh, itself, has oxidized; correct?

12 A. Well, it's the particles that flake off. That's what  
13 we studied. That appeared to be oxidized.

14 Q. But you're not able to measure the extent to which  
15 particles have fallen off of the mesh, are you?

16 A. No, but we did measure the oxygen level in the mesh  
17 with SEM EDAX.

18 Q. And it's true that you have no opinion about the  
19 extent to which any environmental stress cracking impacts  
20 the functionality of the polypropylene mesh for its  
21 intended purpose?

22 A. Well, the fact of the matter is, for it's intended  
23 purpose --

24 Q. Do you have an opinion, first.

25 THE COURT: Sustained.

1 BY MR. THOMAS:

2 Q. It's true that you do not have an opinion about the  
3 extent to which any environmental stress cracking impacts  
4 the functionality of the polypropylene mesh for its  
5 intended purpose?

6 A. Well, yes, I do.

7 Q. Well, THE COURT: 's look at your deposition, please.  
8 THE COURT: 's look at volume 1, page 94, lines 3 through  
9 8.

10 And on line --

11 MR. ANDERSON: Excuse me, counsel, could you  
12 just give me a chance to find the spot?

13 MR. THOMAS: I apologize.

14 MR. ANDERSON: Thank you. Page 94. What lines  
15 are you on?

16 MR. THOMAS: 3 through 8.

17 MR. ANDERSON: 3 through 8.

18 MR. THOMAS: THE COURT: me know when you're --  
19 are you ready?

20 MR. ANDERSON: Yes.

21 BY MR. THOMAS:

22 Q. The question was asked at your deposition, "Do you  
23 have an opinion in the Carolyn Lewis case about the extent  
24 to which any environmental stress cracking impacts the  
25 functionality of the polypropylene mesh for its intended

1 purpose?"

2 And your answer was, "I do not."

3 True?

4 A. I can't quantitate it. That's right.

5 Q. Now, it's your visual observation of oxidation that  
6 causes you to have the opinion that the oxidation of the  
7 mesh in the Carolyn Lewis mesh impacts the functionality  
8 of that mesh for its intended purpose?

9 A. The oxidation does -- does affect the mesh. It  
10 affects its brittleness.

11 Q. But it's your visual observation is the only thing  
12 that causes you to have that opinion; true?

13 A. No, because we saw increased carbonyls in the infrared  
14 of the particles that actually flaked off, which is  
15 evidence of oxidation.

16 Q. THE COURT: me have your deposition, please, volume 1,  
17 page 96, lines 17-22.

18 What is --

19 MR. ANDERSON: 96?

20 MR. THOMAS: 96, lines 17 to 22.

21 MR. ANDERSON: Okay. Thank you.

22 BY MR. THOMAS:

23 Q. "What is it about your work in this case that causes  
24 you to have the opinion that the oxidation of the mesh in  
25 Carolyn Lewis impacts the functionality of that mesh for

1 its intended purpose?

2 "Oxidation is bad. We see it."

3 Did I read that correctly?

4 A. Right. And I was referring both the visual and the  
5 infrared carbonyls.

6 Q. THE COURT: 's look at volume 1, page 95, 19 to 25.

7 Page 95, 19 to 25, Jamie.

8 Line 19 through 25, Jamie.

9 MR. ANDERSON: Thank you.

10 MR. THOMAS: You ready?

11 MR. ANDERSON: Yes. Thank you. I appreciate  
12 that.

13 BY MR. THOMAS:

14 Q. The question is asked, "How does the damage that you  
15 observed affect the ability of the polypropylene mesh to  
16 function in its intended purpose?

17 "Well, something had to cause it to have it removed.  
18 I'm looking at the pictures. It's flaking. I'm looking  
19 at the oxidation. It's oxidized. I don't know how else  
20 to answer --

21 MR. ANDERSON: Your Honor, may we have a  
22 sidebar, please?

23 BY MR. THOMAS:

24 Q. "I don't know how else to answer the question."

25 Did I read that correctly?

1 MR. ANDERSON: May we have a quick sidebar?

2 THE COURT: Sure.

3 SIDEBAR CONFERENCE:

4 THE COURT: All right, sir.

5 MR. ANDERSON: I don't like sidebars. I'm  
6 sorry to do it.

7 THE COURT: That's all right.

8 MR. ANDERSON: But he's asking questions that  
9 are the same as it was in the deposition, and he's trying  
10 to impeach him with a question that's slightly different.  
11 And I'm going to ask counsel, if he's going to do that, to  
12 please read the questions correctly so I don't have to  
13 stand up and keep objecting.

14 That's my objection, sir.

15 THE COURT: I think that the answers are  
16 sufficiently identical to be used for impeachment  
17 purposes. I agree with you that counsel hasn't always  
18 read them as they were written. But they've been in front  
19 of the jury exactly as they are written on their monitor.  
20 I would just caution the defendant to be more careful.

21 MR. THOMAS: Thank you, your Honor.

22 THE COURT: Yes.

23 END OF SIDEBAR CONFERENCE.

24 BY MR. THOMAS:

25 Q. So, if we can add to this list, under Jordi, no change

1 in molecular weight. Correct?

2 A. May I explain myself?

3 Q. That's true, you didn't find any change in molecular  
4 weight; right?

5 A. I would have if I had been able to measure the  
6 surface.

7 Q. Ah.

8 A. Your own people did.

9 Q. Okay. You did not find in your testing any  
10 significant change in molecular weight; true?

11 A. In a gross sense, that's true.

12 MR. THOMAS: That's all the questions I have.  
13 Thank you.

14 THE COURT: All right, redirect.

15 MR. ANDERSON: Thank you, your Honor, just real  
16 briefly.

17 REDIRECT EXAMINATION

18 BY MR. ANDERSON:

19 Q. Dr. Jordi, counsel was asking some questions about  
20 this Dr. Thames; do you recall that?

21 A. I do.

22 Q. The guy that has his name on the building; do you  
23 recall him mentioning that?

24 A. Yes, sir.

25 Q. Is your name on your building, too?

1 A. Yes, sir.

2 Q. Okay. This Dr. Thames -- he said that Dr. Thames did  
3 this testing of the mesh. He made a point to you to say  
4 that you only tested the FTIR microscopy, that little  
5 chemical photograph. You only did it on the particles, he  
6 did it on the mesh. Do you remember that part of your  
7 question?

8 A. I do.

9 Q. In fact, Dr. Thames, in his report and in his  
10 deposition testimony, he didn't even get the mesh until it  
11 had already been scraped in this 20-step shake-and-bake  
12 process in Philadelphia; correct?

13 MR. THOMAS: Objection, your Honor.

14 BY MR. ANDERSON:

15 Q. Is that correct?

16 A. That's correct.

17 MR. THOMAS: Argumentative as well as --

18 THE COURT: Sustained as to leading and  
19 argumentative, and it's direct examination. Go.

20 BY MR. ANDERSON:

21 Q. Did Dr. Thames receive the polypropylene fibers before  
22 or after they had already been cleaned in this 20-step  
23 sonication shaking and nitric bath process?

24 A. After.

25 Q. Do you recall the deposition of Dr. Ong?



1 A. Yes.

2 Q. At the deposition of Dr. Ong, the person in  
3 Philadelphia who went through this 20-step process before  
4 he sent the cleaned mesh material to Dr. Thames, what did  
5 he do once that they -- they shook all the particles off?  
6 What happened to it?

7 A. They basically discarded them. They left them in  
8 solution and presumably disposed of. Anyway, they were  
9 not forwarded to Dr. Thames.

10 Q. Neither Dr. Thames nor Dr. Ong tested those particles  
11 that were shaken off of the mesh, did they?

12 A. That's correct.

13 Q. Now, he came over and wrote some things on this board  
14 which was summarizing some of your testimony. And counsel  
15 put "Degradation loss of functioness of polymer." But  
16 before that you had said something else. Do you recall  
17 what else you were talking in terms of degradation loss of  
18 functioness of polymer when you saw the degradation?

19 A. Well, I saw oxidation; I saw degradation; and then I  
20 saw cracks on the resin; I saw that the particles were  
21 polypropylene that actually came off. And then, as I said  
22 in my deposition, something had to -- I mean, it wasn't  
23 meeting its design function because, otherwise, why was it  
24 taken out of -- out of Ms. Lewis' body.

25 Q. He also put on this board, "Thames, no handling."

1 What would you testify in terms of whether or not

2 Dr. Thames handled the mesh before he took the layers off?

3 A. What did doctor -- sorry.

4 Q. I'm sorry. I'm sorry. You said that you used forceps  
5 and that you handled the mesh, and that Dr. Thames did not  
6 handle the mesh. He handled the mesh, too, didn't he?

7 A. Yes.

8 Q. And when he had handled the mesh the pieces were  
9 already taken off; right?

10 A. Well, they went through the 20-step process.

11 Q. A number of times counsel asked you questions about  
12 molecular weight, and you responded in terms of grossness.  
13 I'd like to ask you, sir, this idea of the mesh didn't  
14 degrade simply because the molecular weight wasn't  
15 changed. When you kept saying, "In a gross sense, that's  
16 true," what do you mean by that?

17 A. That's the same discussion we had several times this  
18 morning, a two-phased system. The outer layer, which is  
19 thin, about 3 microns thick, and then the majority of the  
20 material internal, which is not degraded appreciably at  
21 this point in time.

22 So, again, when you run a GPC, it dissolves the  
23 entire fiber. The outer cracked material flakes or ropey  
24 bulk interior -- material that isn't degraded. So, when I  
25 get a number out, it's an average number, and that average

1 number has been diluted by the nondegraded internal  
2 portion of the fiber.

3 So, of course, the numbers look the same. However,  
4 in Ethicon's own document, as I tried to say, book 1918,  
5 page 248, Dan Burkley said that when he took out mesh, he  
6 took a needle --

7 MR. THOMAS: Objection, your Honor.

8 THE COURT: Is this something that was covered  
9 on cross-examination?

10 MR. THOMAS: No, your Honor. He's talking  
11 about a document that I have problems with.

12 THE COURT: That you what?

13 MR. THOMAS: I have problems with. If he's  
14 going to quote from the document that he's cited to, I  
15 need to have sidebar.

16 THE COURT: Okay. We'd better, because I'm not  
17 clear.

18 SIDEBAR CONFERENCE:

19 THE COURT: Okay, tell me what your objection  
20 is.

21 MR. THOMAS: your Honor, the witness is going  
22 beyond the scope of direct, beyond the scope of cross, and  
23 is going to discuss, I believe, a 1987 document that  
24 there's absolutely no foundation for him to reference in  
25 his foundation opinion testimony about any degradation

1 issues. So, I think it's beyond the scope of direct,  
2 beyond the scope of cross. And this document has not been  
3 admitted into evidence, and he's offering opinion  
4 testimony about the document.

5 THE COURT: What kind of document is it?

6 MR. THOMAS: It's two pages from a lab notebook  
7 from 1987 from a person by the name of Dan Burkley.

8 THE COURT: Who's he?

9 MR. THOMAS: Dan Burkley is a tech person from  
10 Ethicon who received explants from some professor and ran  
11 some testing on these explants. And there's just no  
12 description anywhere in the record, beyond this bare  
13 document, that supports any kind of opinion testimony by  
14 this witness on this topic.

15 THE COURT: Well, and it's close to being  
16 beyond discovery, but I'm going to THE COURT: you do it,  
17 and I'm going to THE COURT: him recross it. All right.

18 MR. ANDERSON: That's fine. Thank you, your  
19 Honor.

20 END OF SIDEBAR CONFERENCE.

21 BY MR. ANDERSON:

22 Q. Okay, going back to what you were just saying, we were  
23 discussing molecular weight. Is there any evidence in the  
24 Ethicon documents as to whether or not -- how molecular  
25 weight is affected by degradation or degradation affects

1 molecular weight? Go right ahead.

2 A. Yes. Dan Burkley received some explanted material --

3 Q. Dan Burkley is an Ethicon employee?

4 A. An Ethicon scientist.

5 Q. Okay.

6 A. And he had taken a needle to explanted mesh. And his  
7 comments on page 248 are that, "It flaked off like a waxy  
8 snow," just like it looks like it would in the SEM photos  
9 we showed you this morning.

10 And then he did a melting point, which, in a gross  
11 sense, correlates with molecular weight. And he said that  
12 the melting point was 146, I think, something like that,  
13 or 155 -- I don't have the document.

14 MR. ANDERSON: Excuse me, your Honor. May I  
15 approach?

16 THE COURT: You may.

17 BY MR. ANDERSON:

18 Q. Plaintiffs' Exhibit Number 35, so that we don't have  
19 to guess on the waxy mesh.

20 A. All right.

21 Q. Got that? Okay, we're going to really need to blow  
22 this up, because I think this is a lab notebooks.

23 A. Fourth paragraph is what you want.

24 THE COURT: Ladies and gentlemen, this is, in  
25 fact, beyond the scope of the original direct

1     interrogation, so this is as though he is putting it on  
2     for the first time, and the other side will then get to  
3     cross-examine about this.

4             All right, go ahead.

5     BY MR. ANDERSON:

6     Q.   Now, we're talking about this discussion that you were  
7     having with Mr. Thomas on cross-examination about  
8     molecular weight. Do you recall that?

9     A.   I do.

10    Q.   And then, if we look at this, what is the date of that  
11    article there of this lab notebook?

12    A.   September, '87.

13    Q.   And what does the subject line say?

14    A.   "Pro explants, IR microscopy again."

15    Q.   And the first paragraph reads, "Prof. Godoin had  
16    agreed to surrender his Prolene explants from his  
17    explanted brats. Some of theirs were slated for  
18    examination by IR microscopy. F. Schiller examined them  
19    optically and by SEM. Eight-year-old sample was severely  
20    cracked, although the cracking was much less than  
21    previously observed."

22             Do you see that?

23    A.   Yes.

24    Q.   And then again, two paragraphs down from that, the  
25    sentence that starts, "The cracked surface came off easily

1 and had the appearance of handling of a waxy snow.  
2 Melting point of the surface material was 147 to 156.  
3 This is in the range of degraded Prolene, Prolene  
4 dissolves in approximately 155 to 165."

5 What does the all that mean in terms of what you  
6 were just saying?

7 A. The lower melting point that's shown here is  
8 indicative of degraded Prolene or polypropylene, and when  
9 it's degraded, it will have a lower molecular weight. But  
10 the only part that has the lower molecular weight is that  
11 3 micron surface cracked area. The interior doesn't. So,  
12 when you run the entire sample, like I had to for GPC and  
13 like they did in the bulk sense, you don't see it. It's  
14 flooded by the majority material in the interior.

15 Q. As the --

16 THE COURT: Well, I need to understand this  
17 molecular weight business.

18 You've got a piece of something. It has molecules  
19 in it. And you can weigh it by some means or another;  
20 scientific means. Right?

21 THE WITNESS: Yes.

22 THE COURT: Is that correct?

23 THE WITNESS: I can explain that fairly easily.

24 THE COURT: No, I'm just asking you, can you do  
25 that?

1 THE WITNESS: Yes, sir.

2 THE COURT: And that's what you did as you  
3 weighed it? Is that right?

4 THE WITNESS: It's called gel permeation  
5 chromatography, and it's a size separation. You can  
6 describe it that way, but it's like --

7 THE COURT: Is it like -- like I'm overweight.  
8 Is it like -- I'll be generous to myself -- I weigh 200  
9 pounds. Is it the same thing? This piece of  
10 polypropylene weighs X. Is that a molecular weight?

11 THE WITNESS: Molecular weight is the chain  
12 length, how many Prolene -- or how many polypropylene  
13 units are bonded together to make a polypropylene  
14 polymer. Like a house. You have a small brick house,  
15 that's a low molecular weight. If you have a big brick  
16 house, that's a high molecular weight.

17 THE COURT: All right. Is molecular weight  
18 different than mass?

19 THE WITNESS: No. Actually, that's a good --  
20 except molecular weight of polymers is an average mass,  
21 because there isn't just one mass in the polymer.

22 THE COURT: It's the total -- and your words  
23 were gross weight? Is that right? Gross molecular weight  
24 is a total of all of the polymers in the strand?

25 A. Right. What I was trying to say is that the chain



1 length, the number of bricks in the polymer on the surface  
2 that's cracked, would be short, small, and the number of  
3 monomer units in the interior would be much longer and it  
4 would be a higher molecular weight.

5 But when I ran the two --

6 THE COURT: I understand.

7 THE WITNESS: Roughly 98 -- you know, because  
8 98% percent of the material, on a weight basis, of that  
9 fiber is the interior, which isn't degraded like the  
10 surface. It gets drowned out. The surface effect gets  
11 drowned out, sir.

12 THE COURT: Okay. And just so that I don't get  
13 in trouble with the lawyers here, THE COURT: me ask you a  
14 couple more questions.

15 You're saying that it weighed the same before and  
16 after the flaking off, in a molecular sense, and you  
17 explain that by saying the weight is kind of a --

18 THE WITNESS: Molecular weight.

19 THE COURT: The molecular weight is kind of an  
20 estimate, or not an accurate number, or something?

21 THE WITNESS: In an average polymer, you're  
22 going to have chains that are made up of 90 monomer units,  
23 chains that are made up of 100, 110 and 120. So, when you  
24 spin out a number, what the machine does it averages it  
25 all together and spits out a number, which is called the

1 MW, the average molecular weight. It would be in between  
2 those two extremes. It would be like 110 in that case.

3 THE COURT: I'm sorry, counsel, but I've got to  
4 go a little further. The piece -- the piece that you  
5 weighed -- and I'm using that word because I don't know  
6 any other -- the piece that you weighed had so many of  
7 these bricks in it. Right?

8 THE WITNESS: The monomer units. Yes, sir.

9 THE COURT: The what? The monomer units?

10 THE WITNESS: Monomer. Each brick is a monomer  
11 unit.

12 THE COURT: Monomer. And when you get a bunch  
13 of them, they're polymers?

14 THE WITNESS: Yeah. Yes, sir.

15 THE COURT: All right. So, at the beginning,  
16 they have so many monomers in them -- THE COURT: 's say  
17 100 -- all right?

18 THE WITNESS: Yes, sir.

19 THE COURT: And after you've finished the  
20 testing, after the flaking off, they still had a hundred  
21 monomers? Is that your testimony?

22 THE WITNESS: No. The flaked material might  
23 have 50, whereas the material in the inside, that second  
24 internal layer, that still had a hundred.

25 THE COURT: So, it's not -- so -- I could take

1 two-thirds of this piece of mesh and throw it away, and I  
2 would still of the same molecular weight as I had when I  
3 started?

4 THE WITNESS: No, sir. If you took -- and the  
5 way this is actually working out, we have the thin outer  
6 skin, remember?

7 THE COURT: No, no, no. I'm asking you. You  
8 said that if you take it off the outside, the inside still  
9 has the same number?

10 THE WITNESS: Right.

11 THE COURT: Well, if I cut it in half, why  
12 doesn't the other half still have the same number?

13 THE WITNESS: Well, it would, if you were --  
14 but now you're running both the outer skin and the inside  
15 part together. In order to see this, you've got to get  
16 the skin material separate from the internal material.  
17 They're not the same.

18 THE COURT: I'm going to THE COURT: the  
19 lawyers straighten it out from here, because I'm still not  
20 clear.

21 THE WITNESS: Sorry.

22 THE COURT: Go ahead.

23 BY MR. ANDERSON:

24 Q. The outside surface could have a different molecular  
25 weight than the interior; correct?

1 A. Yes, sir.

2 Q. And, over time, as the mesh is longer and longer in  
3 the body and it degrades more and more, would you  
4 anticipate that the molecular weight would begin to go  
5 down as more bulk material is degraded?

6 A. Eventually, that will happen, and even on the  
7 interior. It's a slower process, but it will happen  
8 eventually.

9 Q. All right. So, at the time point that this was  
10 explanted from Ms. Lewis' body, it had not reached the  
11 point of degradation to where there was a significant  
12 difference of the molecular weight. Is that true?

13 A. On the inside part of the fiber.

14 THE COURT: No, on the total. The whole deal.  
15 It either weighs the same before and after, no. And  
16 you're telling me that it does.

17 MR. ANDERSON: Your Honor, you're talking about  
18 weight like if you put it on a scale, and that's not  
19 molecular weight.

20 THE COURT: Okay. I'm not putting it on a  
21 scale. I'm putting it on a molecular. Number of  
22 molecules, length of molecules, whatever. You're saying,  
23 if I understand you, and this is what I've got to get  
24 clear, because I think this is what they're quarreling  
25 about -- is it the same molecular weight before and after,

1 and you're saying it is, even though pieces have come off  
2 of it? Is that what you're saying?

3 THE WITNESS: I'm saying that the pieces came  
4 off, if I could run those by themselves, would give me a  
5 lower molecular weight than the interior part of the  
6 fiber. We actually have two different materials here.

7 THE COURT: Is the molecular weight the same  
8 before and after the flaking?

9 THE WITNESS: That's the way we had to run our test, yes,  
10 which is ignoring the surface.

11 THE COURT: I thought it was the surface that  
12 flaked.

13 THE WITNESS: It was, and that's what Dan  
14 Burkley showed when he took it off with a needle and it  
15 came off like snow, and then he measured the melt point,  
16 which was lower, which also means the molecular weight is  
17 lower.

18 THE COURT: I'd better quit.

19 MR. ANDERSON: I'll stop that part of the --  
20 well, I'll move on, then.

21 THE COURT: Well, now, I mean, you do whatever  
22 you want. I'm --

23 MR. ANDERSON: It's just a different number of  
24 molecules on the outside.

25 THE COURT: It's for the jury to understand.

1 It doesn't really make much difference as to the depth of  
2 mine.

3 BY MR. ANDERSON:

4 Q. Please pull up demonstrative Exhibit 20, page 115.  
5 Demonstrative Exhibit 20, page 48.

6 MR. ANDERSON: May I approach up this way, your  
7 Honor?

8 THE COURT: Sure.

9 MR. ANDERSON: Thank you.

10 BY MR. ANDERSON:

11 Q. You were talking before about these striations. Do  
12 you recall that?

13 A. I do.

14 Q. And now I'm asking you if you saw striations over here  
15 on this fiber; correct?

16 A. I do.

17 MR. THOMAS: Your Honor, that's beyond the  
18 scope.

19 THE COURT: It is. I'll sustained it.

20 BY MR. ANDERSON:

21 Q. Do you recall when you were asked by Mr. Thomas on  
22 cross-examination about that you had a striking difference  
23 of opinion with Dr. Thames in that the cracked surface of  
24 the SEM photographs from Ms. Lewis, Dr. Thames said they  
25 were protein and you said they were polypropylene. Do you

1 recall that part of your cross-examination?

2 A. Yes.

3 Q. And, as part of that cross-examination, would it be  
4 helpful for you to explain to the jury the two photos that  
5 we just looked at in terms of what it looked like on  
6 appearance on the surface of the material?

7 A. That's correct.

8 THE COURT: Are these photos that we've already  
9 got in evidence?

10 MR. ANDERSON: Yes, sir.

11 THE COURT: All right. Go ahead. I'll  
12 overrule.

13 MR. ANDERSON: Can you put that back up.

14 BY MR. ANDERSON:

15 Q. Remember you were talking about the these striations  
16 being caused in the guides as it went through the  
17 extrusion process during manufacturing?

18 A. They're called extrusion marks.

19 Q. Is the cracking on the right-hand picture going  
20 through the extrusion marks on the polypropylene?

21 A. They are, which is how I know that those cracks, the  
22 cracked material there, is polypropylene. It's another  
23 way of -- it's not like infrared. It's just an eyeball  
24 way of telling it's the same thing as the other polymer.

25 Q. And if we look at that big blob of white tissue to the

1 side, is that polypropylene or are those proteins?

2 A. That would be protein. That would be tissue.

3 MR. ANDERSON: Thank you. No further  
4 questions.

5 THE COURT: Okay, counsel.

6 RECROSS-EXAMINATION

7 BY MR. THOMAS:

8 Q. I believe it was Plaintiff's Exhibit 35 which you just  
9 read. Was that the lab notebook?

10 MR. ANDERSON: I can't hear you, Dave. I  
11 apologize.

12 MR. THOMAS: I'm sorry. I apologize. I put my  
13 mike away. Sorry about that.

14 BY MR. THOMAS:

15 Q. Plaintiff's Exhibit Number 35 are the two pages of the  
16 lab notebook; is that correct?

17 A. Yes, sir.

18 Q. You don't know whether -- where those explants came  
19 from, do you?

20 A. No, sir, I just have this material.

21 Q. You don't know the circumstances of their creation, do  
22 you?

23 A. No.

24 Q. You don't know the nature of the experiment that was  
25 being performed, do you?



1 A. Well, it tells me they're Prolene explants from --

2 Q. I understand that, but you don't know the experiment  
3 that was going on or any history behind these two pages in  
4 this document other than what you have in front of you?

5 A. No, I don't. Of course not.

6 Q. The document refers to photo-oxidation, doesn't it, on  
7 page 2?

8 A. Well, that page 2 discusses photo-oxidation, but how  
9 is photo-oxidation on an explant in the first place?

10 Q. Exactly. There would not be photo-oxidation in an  
11 explant, would there?

12 A. No.

13 Q. And photo-oxidation can degrade polypropylene, can't  
14 it?

15 A. Its one of the many ways it can, yes.

16 Q. All right. Now, THE COURT: 's talk about molecular  
17 weight a little bit. A little bit, I hope.

18 You did one test on molecular weight on the Carolyn  
19 Lewis explant; correct?

20 A. And Christine's, yes.

21 Q. Okay. And on the Carolyn Lewis explant you found no  
22 significant change in molecular weight; correct?

23 A. In a gross sense, that's correct.

24 Q. All right. You did not attempt to scrape off any of  
25 the material that you claim to be cracked polypropylene

1 and measure that for molecular weight; correct?

2 A. How I wish I could have done it. I didn't have enough  
3 materials.

4 Q. The answer to my question is no, you did not test;  
5 correct?

6 A. No.

7 Q. The answer to my question is did you test any flaked  
8 material off of a polypropylene mesh for molecular weight?

9 A. Did not have enough to test.

10 Q. So, you don't know, without testing, whether there's  
11 any change in molecular weight on the surface of that  
12 polypropylene?

13 A. Judging from this paragraph in your own document, yes,  
14 I do believe that's the case.

15 Q. Excuse me, Dr. Jordi, have you tested that?

16 A. Have I tested what?

17 Q. Any exterior mesh -- strike that. Have you ever  
18 measured -- you've already answered my question. You have  
19 not measured the flaked material from the Carolyn Lewis  
20 mesh sample to determine whether there was any change in  
21 molecular weight?

22 A. Didn't have enough to test.

23 MR. THOMAS: Thank you.

24 THE COURT: May the witness step down?

25 MR. THOMAS: Yes, your Honor.

1 MR. ANDERSON: Yes, your Honor. Nothing  
2 further.

3 THE COURT: May he be excused?

4 MR. ANDERSON: Yes, your Honor.

5 THE COURT: Thank you, Doctor. You're excused.  
6 Call your next witness.

7 THE WITNESS: Your Honor, what do I do with all  
8 of these materials? Anything?

9 THE COURT: That's going to be up to the  
10 lawyers to figure out.

11 THE WITNESS: Just leave it?

12 THE COURT: Just leave it right there.

13 THE WITNESS: Yes, sir.

14 (The witness withdrew.)

15 MR. CARTMELL: Did you say it? I missed it.  
16 I'm sorry.

17 THE COURT: I said call your next witness.

18 MR. CARTMELL: Oh, I'm sorry. Laura Angelini.  
19 She's the marketing director from Ethicon.

20 THE COURT: Okay.

21 MR. CARTMELL: Your Honor, may we approach real  
22 quick? There is an objection that we need to visit about  
23 that still exists.

24 THE COURT: All right.

25 SIDEBAR CONFERENCE:

1 THE COURT: All right.

2 MR. CARTMELL: Sorry about the delay.

3 THE COURT: All right.

4 MR. CARTMELL: The Angelini deposition, we are  
5 all good to go on our part. They've cross-designated what  
6 they wanted to on our part.

7 THE COURT: Uh-huh.

8 MR. CARTMELL: And then what I'm talking about  
9 is all this green stuff here. This is all their  
10 designations, the green stuff. They're talking to a  
11 marketing person about all kinds of literature, all kinds  
12 of opinions related to what a doctor would say, and we  
13 have objected to that as outside the scope.

14 MS. JONES: I confess, your Honor, I thought it  
15 was all agreed upon. This is if first time I've heard  
16 that there was any objection to it.

17 MR. CARTMELL: Well, see, this is what I'm  
18 talking about. They come from your office and these were  
19 the objections that were in place at the office. And this  
20 was all -- none of this is part of our designation. You  
21 did -- you did your Rule 26 designations.

22 MS. JONES: I'm saying counsel --

23 MR. CARTMELL: This is your direct. You can  
24 play this in your case, but it's beyond the scope of our  
25 cross.

1 MS. JONES: I hear what you're saying. It's  
2 beyond the scope. What I'm telling you is that until 30  
3 seconds ago, I was under the impression that everything  
4 was agreed upon.

5 THE COURT: So, we're going to go home right  
6 now, all right?

7 MR. CARTMELL: We're ready to play our part,  
8 your Honor.

9 THE COURT: Look, I honestly -- this -- this is  
10 the last time I'm going to say it. First, here's the  
11 rule. Present the transcript to the courtroom deputy  
12 Clerk before you play the videotape or recording, or  
13 present the deposition in any other way, as required by  
14 the rule. And that is the transcript.

15 If you have not been able to resolve the objections,  
16 then instead of playing it on videotape, I mean, any  
17 objections from here on out, we're going to read it, and  
18 you can object, you can do whatever you want. But that's  
19 how we're going to do it. No more, period. Otherwise,  
20 get one of your lawyers and put them on the stand, give me  
21 a transcript, start reading and start objecting. That's  
22 it.

23 MS. JONES: Your Honor, I understand your  
24 ruling. If they want to play their portion now, without  
25 cross-designations, I won't have any objection to doing

1 it. We will play ours during the course of our case.

2 All I'm saying to your Honor -- and I hear what  
3 you're saying in terms of working it out, but we have to  
4 know a little bit in advance if there's an issue.

5 THE COURT: I'm sorry?

6 MS. JONES: We have to know a little bit in  
7 advance if there's an issue. If they want to go ahead  
8 with their part, we'll reserve our right to play ours in  
9 our case-in-chief.

10 THE COURT: The next time somebody comes up  
11 here and says there's an issue, that's the end of the  
12 discussion. We're going to read it, understood?

13 All right.

14 MS. JONES: Understood.

15 THE COURT: Now, based on the representation of  
16 the defendant, if you want to go in and put this in, I  
17 think it will be better than wasting the jury's time.

18 MR. CARTMELL: I do, too.

19 THE COURT: And we can do the rest later. So,  
20 THE COURT: 's do that part.

21 MR. CARTMELL: Thank you, your Honor.

22 THE COURT: And don't forget to present the  
23 transcript to the court reporter.

24 END OF SIDEBAR CONFERENCE.

25 (Video deposition of Laura Angelini played.)

1 MR. CARTMELL: Just one more, your Honor,  
2 small.

3 THE COURT: All right.

4 MR. COMBS: Judge?

5 THE COURT: Yes.

6 MR. COMBS: May we approach?

7 THE COURT: Yes.

8 SIDEBAR CONFERENCE:

9 MR. CARTMELL: Go ahead.

10 MR. COMBS: Judge, we stood up here 30 or 40  
11 minutes ago and Mr. Cartmell objected and said he couldn't  
12 play the clips that we had designated to play, but that  
13 they were going to be playing the clips that we had  
14 designated and that were counter-designations to this  
15 clip. And we just didn't play them. I mean, right here,  
16 this is what they gave me. And right here they just cut  
17 them off right in the middle.

18 MR. CARTMELL: What was cut off?

19 MR. COMBS: Right here.

20 MR. CARTMELL: What, the last second wasn't  
21 played? We'll play that again. I apologize.

22 THE COURT: You want this part?

23 MR. COMBS: I don't know, I'm going to have to  
24 look.

25 THE COURT: Well, go ahead and --

1 MR. COMBS: Right this second? I'm sorry, I  
2 didn't --

3 THE COURT: Wait.

4 MR. COMBS: I'm sorry, I didn't mean to  
5 interrupt you, Judge. I'm sorry.

6 THE COURT: What part of the deposition do you  
7 believe there's an agreement to play, and you may take the  
8 time to look and find it.

9 MR. COMBS: Judge, I mean, obviously, there was  
10 the clip that was just stopped in midsentence.

11 THE COURT: And --

12 MR. COMBS: And there are, in addition to that,  
13 the cut that they gave us this morning. There are --

14 MR. CARTMELL: It's going to be played.

15 MR. COMBS: -- there are ten pages. I mean,  
16 are you still planning to play those?

17 MR. CARTMELL: Yes. This is our cut.

18 MR. FREESE: That's what Christy said. She  
19 said play it.

20 MR. CARTMELL: He did cut off your cut. I'll  
21 tell him to replay it. It was three sentences.

22 THE COURT: I do understand that Ms. Jones said  
23 that the parts designated by the defendants would be  
24 played in their case. You understood, if I get your  
25 objection, that the parts that were -- were agreed upon as



1 responsive to the direct examination would be played  
2 today, and the other parts to which they had objections  
3 would be played in your case? Is that what you're saying?

4 MR. COMBS: Yes, sir, your Honor. There were  
5 two clips that redirect was conducted after -- on a second  
6 day of the deposition, and those two clips are what I  
7 understood would be played in our case. And we've agreed  
8 to play them in our case.

9 THE COURT: But there's some now that you would  
10 like to go ahead and play. And are those -- any of those  
11 things that you had objections to?

12 MR. CARTMELL: No. There was that one little  
13 short thing that did get cut off in the middle.

14 THE COURT: I mean, but he's talking about  
15 another several pages here.

16 MR. CARTMELL: Those are ours. Those are ours.

17 THE COURT: I'm sorry.

18 MR. CARTMELL: No, the next --

19 THE COURT: No, no, he's thinking that you  
20 agreed to play their responsive parts of the testimony  
21 today and the parts that you objected to as nonresponsive  
22 would be played tomorrow.

23 Isn't that what you're saying?

24 MR. COMBS: Judge, if there's no more that they  
25 want to play of this deposition, I'll sit up and I'll shut

1 up, and we'll just go --

2 MR. CARTMELL: No more of the next, you mean?  
3 Because we do have more of those next pages, obviously.

4 THE COURT: I don't understand. Do you all  
5 want to work it out right now?

6 MR. CARTMELL: I can explain real quick. We  
7 gave him this. That has all of our designations on it.  
8 He stood up because it cut off three sentences. There's  
9 no more that they designated in between then. We just  
10 then will finish this. It's like 10 pages. It'll take no  
11 more than 10 or 12 minutes that we're going to play right  
12 now.

13 THE COURT: That's what you're talking about?

14 MR. COMBS: Yes, sir, that's the objection.

15 THE COURT: All right. THE COURT: 's go ahead  
16 and play the ten pages.

17 END OF SIDEBAR CONFERENCE.

18 THE COURT: All right? We've got about ten  
19 pages, and then we're going to break for the day.

20 (Videotape deposition of Laura Angelini continues.)

21 MR. CARTMELL: That's the end of the deposition  
22 of Laura Angelini, your Honor.

23 MS. JONES: We'll reserve our right to visit  
24 that until later, your Honor.

25 THE COURT: All right.

1           Ladies and gentlemen, we're going to recess early  
2 for the day. I recommend that you take a conservative  
3 approach making the decision about whether to go or stay  
4 home.

5           The weatherman has the snow going slightly to the  
6 east of us, but the forecast is 100% snow, with 3 to 5  
7 inches in Charleston.

8           So, I think it will be important that you err on the  
9 side of caution in terms of going forward. We can't go  
10 forward without all of you. I need you all. And, as you  
11 can see, this is quite a large undertaking with a lot of  
12 people involved.

13           And I recognize, as do the lawyers and the parties,  
14 the imposition that this places upon you, but I ask that  
15 you eat a good meal on the government, and that you enjoy  
16 yourself as best you can.

17           Finally, I have to say, do not discuss the case  
18 among yourselves, don't THE COURT: anyone to discuss it  
19 with you, don't watch anything about it, listen to  
20 anything about it, read anything about it, use social  
21 media, talk to anybody or allow anybody to talk about it  
22 in your presence.

23           I'll see you back here tomorrow morning, all of you,  
24 ready to go at 9 o'clock. And we're going to have a full  
25 day tomorrow with no big long breaks.

1 (The jury withdrew.)

2 Looks like we gained all of an hour and 15 minutes  
3 through your additional work.

4 Right now, unless things get much, much better,  
5 which I'm an optimistic person, I'm considering putting an  
6 order in place for all of your cases that will be very  
7 restrictive on how objections are made and handled in  
8 video depositions.

9 Just as a thought, all video depositions may have to  
10 have two double-spaced page statement of objection and  
11 argument in a week in advance, with specific line  
12 references and attachments of those lines. A day later  
13 there will be a two-page response, a day after that a  
14 reply.

15 After that, any objection, after I review them,  
16 found to be frivolous will result in a \$1,000 sanction,  
17 and if found to be a part of a pattern of sanctions, will  
18 result in a very substantial judgment.

19 I'd rather not do that, so please meet.

20 Good night.

21 (Proceedings adjourned at 3:46 p.m.)

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CERTIFICATE OF OFFICIAL REPORTERS

Teresa M. Ruffner and Harold M. Hagopian do hereby  
certify that the foregoing is a true and correct  
transcript, to the best of our abilities, from the record  
of proceedings in the above-entitled matter.

s/Teresa M. Ruffner  
Reporter

February 12, 2014  
Date

s/Harold M. Hagopian  
Reporter

February 12, 2014  
Date